Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-19)

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: January 1, 1986 through March 31, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.68200
Austria	Schilling	.058140
Belgium	Franc	.020036
Brazil	Cruziero	.000095
Canada	Dollar	.713776
China, P.R	Renminbi yuan	.311575
Denmark	Krone	.112284
Finland	Markka	.185305
France	Franc	.133574
Germany	Deutsche mark	.410172
Hong Kong	Dollar	.128057
India	Rupee	.082988
Iran	Rial	N/A
Ireland	Pound	1.2420
Italy	Lira	.000601
Japan	Yen	.005021
Malaysia	Dollar	.413565
Mexico	Peso	N/A
Netherlands	Guilder	.363702
New Zealand	Dollar	.50200
Norway	Krone	.132433
Philippines	Peso	N/A

Country	Name of currency	U.S. dollars
Portugal	Escudo	.006329
Republic of South Africa	Rand	.39500
Singapore	Dollar	.473037
Spain	Peseta	.006527
Sri-Lanka	Rupee	.036460
Sweden	Krona	.132083
Switzerland	Franc	.487805
Thailand	Baht (tical)	.037594
United Kingdom	Pound	1.4505
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-20)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 1, 1985	$0.006536
Israel shekel:	
November 1, 1985	N/A
South Korea won:	
November 1, 1985	.001118
Taiwan N.T. dollar:	
November 1, 1985	.024925

(LIQ-03-01 S:COM CIE)
Dated: November 1, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-21)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 4, 1985	$0.006545
November 5, 1985	.006510
November 6, 1985	.006519
November 7, 1985	.006540
November 8, 1985	.006462
Israel shekel:	
November 4–8, 1985	N/A
South Korea won:	
November 4–5, 1985	.001119
November 6, 1985	.001118
November 7–8, 1985	.001119
Taiwan N.T. dollar:	
November 4, 1985	.024938
November 5–6, 1985	.024963
November 7, 1985	.024988
November 8, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: November 8, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-22)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others con-

cerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 11, 1985, holiday.

Greece drachma:	
November 12, 1985	$0.006464
November 13, 1985	.006498
November 14–15, 1985	.006485
Israel shekel:	
November 12–15, 1985	N/A
South Korea won:	
November 12–13, 1985	.001118
November 14–15, 1985	.001119
Taiwan N.T. dollar:	
November 12, 1985	N/A
November 13, 1985	.024994
November 14, 1985	.025000
November 15, 1985	.025006

(LIQ–03–01 S:COM CIE)

Dated: November 15, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–23)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 18, 1985	$0.006483
November 19, 1985	.006523
November 20, 1985	.006502
November 21, 1985	.006545
November 22, 1985	.006557
Israel shekel:	
November 18–22, 1985	N/A

South Korea won:	
November 18–19, 1985	.001119
November 20–22, 1985	.001120
Taiwan N.T. dollar:	
November 18, 1985	.025019
November 19, 1985	.025025
November 20, 1985	.025031
November 21, 1985	N/A
November 22, 1985	.025044

(LIQ–03–01 S:COM CIE)

Dated: November 22, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–24)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 28, 1985, holiday.

Greece drachma:	
November 25, 1985	$0.006592
November 26, 1985	.006609
November 27, 1985	.006605
November 29, 1985	.006702
Israel shekel:	
November 25–29, 1985	N/A
South Korea won:	
November 25, 1985	.001121
November 26, 1985	.001121
November 27, 1985	.001120
November 29, 1985	.001121
Taiwan N.T. dollar:	
November 25, 1985	.025063
November 26, 1985	.025069

November 27, 1985	.025082
November 29, 1985	.025100

(LIQ-03-01 S:COM CIE)

Dated: November 29, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-25)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 2, 1985	$0.006739
December 3, 1985	.006647
December 4, 1985	.006676
December 5, 1985	.006662
December 6, 1985	.006667
Israel shekel:	
December 2–6, 1985	N/A
South Korea won:	
December 2, 1985	.001122
December 3–5, 1985	.001121
December 6, 1985	.001120
Taiwan N.T. dollar:	
December 2, 1985	.025113
December 3, 1985	.025100
December 4, 1985	.025075
December 5–6, 1985	.025050

(LIQ-03-01 S:COM CIE)

Dated: December 6, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-26)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 9, 1985	$0.006645
December 10, 1985	.006620
December 11, 1985	.006601
December 12-13, 1985	.006640
Israel shekel:	
December 9-13, 1985	N/A
South Korea won:	
December 9, 1985	.001120
December 10-11, 1985	.001119
December 12, 1985	.001118
December 13, 1985	.001119
Taiwan N.T. dollar:	
December 9, 1985	.025063
December 10, 1985	.025082
December 11, 1985	.025075
December 12, 1985	.025063
December 13, 1985	.025069

(LIQ-03-01 S:COM CIE)

Dated: December 13, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-27)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published

for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 16, 1985	$0.006631
December 17, 1985	.006658
December 18, 1985	.006631
December 19, 1985	.006636
December 20, 1985	.006623
Israel shekel:	
December 16–20, 1985	N/A
South Korea won:	
December 16–19, 1985	.001119
December 20, 1985	.001118
Taiwan N.T. dollar:	
December 16, 1985	.025044
December 17, 1985	.025038
December 18, 1985	.025025
December 19–20, 1985	.025031

(LIQ–03–01 S:COM CIE)

Dated: December 20, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–28)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

December 25, 1985, holiday.

Greece drachma:	
December 23, 1985	$0.006636
December 24–26, 1985	.006645
December 27, 1985	.006711

Israel shekel:	
December 23–27, 1985	N/A
South Korea won:	
December 23–27, 1985	.001119
Taiwan N.T. dollar:	
December 23, 1985	.025044
December 24, 1985	.025031
December 26, 1985	.025044
December 27, 1985	.025050

(LIQ–03–01 S:COM CIE)

Dated: December 27, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–29)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 30, 1985	$0.006725
December 31, 1985	.006757
Israel shekel:	
December 30–31, 1985	N/A
South Korea won:	
December 30–31, 1985	.001120
Taiwan N.T. dollar:	
December 30, 1985	.002647
December 31, 1985	.002664

(LIQ–03–01 S:COM CIE)

Dated: December 31, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-30)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

January 1, 1986, holiday.

Greece drachma:	
January 2, 1986	$0.006780
January 3, 1986	.006711
Israel shekel:	
January 2-3, 1986	N/A
South Korea won:	
January 2, 1986	.001120
January 3, 1986	.001120
Taiwan N.T. dollar:	
January 2-3, 1986	N/A

(LIQ-03-01 S:COM CIE)

Dated: January 3, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-31)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 6, 1986	$0.006743
January 7, 1986	.006780

January 8, 1986	.006734
January 9, 1986	.006676
January 10, 1986	.006700
Israel shekel:	
January 6–10, 1986	N/A
South Korea won:	
January 6–7, 1986	.001120
January 8, 1986	.001121
January 9–10, 1986	.001120
Taiwan N.T. dollar:	
January 6, 1986	.025082
January 7, 1986	.025094
January 8, 1986	N/A
January 9, 1986	.025119
January 10, 1986	.025132

(LIQ–03–01 S:COM CIE)

Dated: January 10, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–32)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 13, 1986	$0.006645
January 14, 1986	.006662
January 15, 1986	.006676
January 16, 1986	.006662
January 17, 1986	.006676
Israel shekel:	
January 13–17, 1986	N/A
South Korea won:	
January 13, 1986	.001120
January 14–15, 1986	.001119
January 16–17, 1986	.001120

Taiwan N.T. dollar:	
January 13, 1986	.025227
January 14, 1986	.025183
January 15, 1986	.025202
January 16, 1986	.025208
January 17, 1986	.025221

(LIQ-03-01 S:COM CIE)

Dated: January 17, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-33)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

January 20, 1986, holiday.

Greece drachma:	
January 21, 1986	$0.006664
January 22, 1986	.006693
January 23, 1986	.006689
January 24, 1986	.006725
Israel shekel:	
January 21-24, 1986	N/A
South Korea won:	
January 21-23, 1986	.001119
January 24, 1986	.001120
Taiwan N.T. dollar:	
January 21, 1986	.025246
January 22, 1986	.025265
January 23, 1986	.025278
January 24, 1986	.025291

(LIQ-03-01 S:COM CIE)

Dated: January 24, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-34)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 27, 1986	$0.006793
January 28, 1986	.006793
January 29, 1986	.006807
January 30, 1986	.006821
January 31, 1986	.006812
Israel shekel:	
January 27-31, 1986	N/A
South Korea won:	
January 27, 1986	.001120
January 28-29, 1986	.001121
January 30-31, 1986	.001122
Taiwan N.T. dollar:	
January 27, 1986	.025342
January 28, 1986	.025374
January 29, 1986	.025387
January 30, 1986	.025400
January 31, 1986	.025407

(LIQ-03-01 S:COM CIE)

Dated: January 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-35)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 1, 1985	$0.000116
China P.R. renminbi yuan:	
November 1, 1985	.311575
Mexico peso:	
November 1, 1985	.002041
New Zealand dollar:	
November 1, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: November 1, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-36)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
November 5, 1985	$0.66830
November 6, 1985	.66150
November 7, 1985	.66450
November 8, 1985	.67300

Brazil cruzeiro:	
November 4, 1985	.000116
November 5, 1985	.000116
November 6–7, 1985	.000115
November 8, 1985	.000114
China P.R. renminbi yuan:	
November 4–8, 1985	.311575
Mexico peso:	
November 4, 1985	.002024
November 5, 1985	.002008
November 6–8, 1985	N/A
New Zealand dollar:	
November 6, 1985	.58600
November 7, 1985	.58550
November 8, 1985	.58500
Republic of South Africa rand:	
November 8, 1985	.36750

(LIQ–03–01 S:COM CIE)

Dated: November 8, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–37)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 11, 1985, holiday.

Australia dollar:	
November 12, 1985	$0.66100
November 13, 1985	.66320
November 14, 1985	.66980
November 15, 1985	.67300

Brazil cruzeiro:	
November 12, 1985	.000114
November 13–15, 1985	.000113
China P.R. renminbi yuan:	
November 12–15, 1985	.311575
Japan yen:	
November 13, 1985	.004902
November 14, 1985	.004918
November 15, 1985	.004895
Mexico peso:	
November 12–15, 1985	N/A
Republic of South Africa rand:	
November 12, 1985	.36950
November 13, 1985	.37100
November 14, 1985	.37150
November 15, 1985	.37000

(LIQ–03–01 S:COM CIE)

Dated: November 15, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–38)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
November 18, 1985	$0.67350
Brazil cruzeiro:	
November 18–19, 1985	.000112
November 20, 1985	.000111
November 21–22, 1985	.000110
China P.R. renminbi yuan:	
November 18, 1985	.313283
November 19–22, 1985	.311575

Japan yen:	
November 18, 1985	.004915
November 19, 1985	.004926
November 20, 1985	.004915
November 21, 1985	.004948
November 22, 1985	.004966
Mexico peso:	
November 18–22, 1985	N/A
Republic of South Africa rand:	
November 18–20, 1985	.37100
November 21, 1985	.37250
November 22, 1985	.37350

(LIQ–03–01 S:COM CIE)

Dated: November 22, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–39)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 28, 1985, holiday.

Austria schilling:	
November 29, 1985	$0.056625
Belgium franc:	
November 29, 1985	.019577
Brazil cruzeiro:	
November 25–26, 1985	.000109
November 27, 1985	.000108
November 29, 1985	.000107
China P.R. renminbi yuan:	
November 25–29, 1985	.311575
Denmark krone:	
November 27, 1985	.108879
November 29, 1985	.109769

Finland markka:	
November 29, 1985	.183993
France franc:	
November 29, 1985	.130463
Germany deutsche mark:	
November 29, 1985	.398010
Ireland pound:	
November 29, 1985	1.2290
Japan yen:	
November 25, 1985	.004980
November 26, 1985	.004975
November 27, 1985	.004974
November 29, 1985	.004948
Mexico peso:	
November 25–29, 1985	N/A
Netherlands guilder:	
November 29, 1985	.353732
Republic of South Africa rand:	
November 25, 1985	.37500
November 29, 1985	.37000
United Kingdom pound:	
November 29, 1985	1.4890

(LIQ–03–01 S:COM CIE)

Dated: November 29, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–40)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currenty into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 2, 1985	$0.056465
December 4, 1985	.056529

Belgium franc:	
December 4, 1985	.019547
Brazil cruzeiro:	
December 2–3, 1985	.000106
December 4–6, 1985	.000105
China P.R. renminbi yuan:	
December 2–6, 1985	.311575
Denmark krone:	
December 2, 1985	.109469
December 3, 1985	.109081
December 4, 1985	.109661
December 5, 1985	.109397
December 6, 1985	.109254
France franc:	
December 2, 1985	.130039
December 4, 1985	.130124
December 5, 1985	.130124
Germany deutsche mark:	
December 2, 1985	.396558
December 4, 1985	.396904
December 5, 1985	.397062
December 6, 1985	.395961
Japan yen:	
December 2, 1985	.004901
December 3, 1985	.004884
December 4, 1985	.004935
December 5, 1985	.004926
December 6, 1985	.004916
Mexico peso:	
December 2–6, 1985	N/A
Netherlands guilder:	
December 2, 1985	.352423
December 4, 1985	.352734
December 5, 1985	.352858
December 6, 1985	.351865
Republic of South Africa rand:	
December 2, 1985	.35500
December 3, 1985	.36150
December 4, 1985	.35750
December 5, 1985	.36000
December 6, 1985	.36250
United Kingdom pound:	
December 2, 1985	1.4875
December 4, 1985	1.4860

(LIQ–03–01 S:COM CIE)

Dated: December 6, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-41)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 12, 1985	$0.056529
December 13, 1985	.056433
Brazil cruzeiro:	
December 9, 1985	.000104
December 10-11, 1985	.000103
December 12, 1985	.000102
December 13, 1985	.000101
China P.R. renminbi yuan:	
December 9-13, 1985	.311575
Denmark krone:	
December 9, 1985	.109033
December 12, 1985	.109673
December 13, 1985	.109337
France franc:	
December 12, 1985	.130039
Germany deutsche mark:	
December 12, 1985	.397614
December 13, 1985	.396511
Ireland pound:	
December 12, 1985	1.2270
Japan yen:	
December 9, 1985	.004914
December 10, 1985	.004912
December 11, 1985	.004904
December 12, 1985	.004949
December 13, 1985	.004931
Mexico peso:	
December 9-13, 1985	N/A

Netherlands guilder:	
December 12, 1985	.352983
December 13, 1985	.352051
New Zealand dollar:	
December 13, 1985	.52100
Republic of South Africa rand:	
December 9, 1985	.37500
December 10, 1985	.37200
December 11, 1985	.37250
December 12, 1985	.37800
December 13, 1985	.37500

(LIQ-03-01 S:COM CIE)

Dated: December 13, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-42)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 17, 1985	$0.056657
December 18, 1985	.056561
December 19, 1985	.056561
December 20, 1985	.056633
Brazil cruzeiro:	
December 16, 1985	.000101
December 17-18, 1985	.000100
December 19, 1985	.000099
December 20, 1985	.000098
China P.R. renminbi yuan:	
December 16-20, 1985	.311575
Denmark krone:	
December 16, 1985	.109158

December 17, 1985	.109637
December 18, 1985	.109218
December 19, 1985	.109242
December 20, 1985	.109439
France franc:	
December 17, 1985	.130132
December 20, 1985	.129786
Germany deutsche mark:	
December 16, 1985	.396275
December 17, 1985	.398168
December 18, 1985	.397140
December 19, 1985	.397298
December 20, 1985	.398089
Ireland pound:	
December 17, 1985	1.2293
Japan yen:	
December 16, 1985	.004936
December 17, 1985	.004952
December 18, 1985	.004922
December 19, 1985	.004927
December 20, 1985	.004933
Mexico peso:	
December 16–20, 1985	N/A
Netherlands guilder:	
December 16, 1985	.351679
December 17, 1985	.353419
December 18, 1985	.352423
December 19, 1985	.352609
December 20, 1985	.353482
New Zealand dollar:	
December 16, 1985	.47950
December 17, 1985	.50100
December 18, 1985	.50350
December 19, 1985	.50400
December 20, 1985	.49600
Republic of South Africa rand:	
December 16, 1985	.37750
December 17, 1985	.37150
December 18, 1985	.37100
December 19, 1985	.37250
December 20, 1985	.37500

(LIQ–03–01 S:COM CIE)

Dated: December 20, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-43)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

December 25, 1985, holiday.

Austria schilling:	
December 23, 1985	$0.056754
December 24, 1985	.056818
December 26, 1985	.056818
December 27, 1985	.057491
Belgium franc:	
December 24-26, 1985	.019550
December 27, 1985	.019794
Brazil cruzeiro:	
December 23-26, 1985	.000098
December 27, 1985	.000096
China P.R. renminbi yuan:	
December 23-27, 1985	.311575
Denmark krone:	
December 23, 1985	.109769
December 24, 1985	.109830
December 26, 1985	.109769
December 27, 1985	.110865
France franc:	
December 23, 1985	.130081
December 24, 1985	.130293
December 26, 1985	.130124
December 27, 1985	.131752
Germany deutsche mark:	
December 23, 1985	.399202
December 24, 1985	.399122
December 26, 1985	.399202
December 27, 1985	.404367
Ireland pound:	
December 27, 1985	1.2350
Italy lira:	
December 27, 1985	.000593
Japan yen:	
December 23, 1985	.004939

December 24, 1985	.004932
December 26, 1985	.004931
December 27, 1985	.004946
Mexico peso:	
December 23–27, 1985	N/A
Netherlands guilder:	
December 23, 1985	.354233
December 24, 1985	.353982
December 26, 1985	.354610
December 27, 1985	.358873
New Zealand dollar:	
December 23, 1985	.50000
December 24–26, 1985	.50200
December 27, 1985	.50150
Republic of South Africa rand:	
December 23, 1985	.37320
December 24, 1985	.37400
December 26, 1985	.37500
December 27, 1985	.37750

(LIQ-03-01 S:COM CIE)

Dated: December 27, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-44)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 30, 1985	$0.057670
December 31, 1985	.058109
Belgium franc:	
December 30, 1985	.019841
December 31, 1985	.019980

Brazil cruzeiro:	
December 30–31, 1985	.000095
China P.R. renminbi yuan:	
December 30–31, 1985	.311575
Denmark krone:	
December 30, 1985	.111266
December 31, 1985	.111919
Finland markka:	
December 30, 1985	.183993
December 31, 1985	.185048
France franc:	
December 30, 1985	.132363
December 31, 1985	.133200
Germany deutsche mark:	
December 30, 1985	.405680
December 31, 1985	.408664
Ireland pound:	
December 30, 1985	1.2405
December 31, 1985	1.2470
Italy lira:	
December 30, 1985	.000595
December 31, 1985	.000600
Japan yen:	
December 30, 1985	.004974
December 31, 1985	.004994
Mexico peso:	
December 30–31, 1985	N/A
Netherlands guilder:	
December 30, 1985	.360101
December 31, 1985	.363108
New Zealand dollar:	
December 30–31, 1985	.50050
Portugal escudo:	
December 30, 1985	.006289
December 31, 1985	.006301
Spain peseta:	
December 30, 1985	.006485
December 31, 1985	.006498
Sweden krona:	
December 30, 1985	.131579
December 31, 1985	.132013
Switzerland franc:	
December 31, 1985	.485437

(LIQ–03–01 S:COM CIE)

Dated: December 31, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-45)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to covert such currency into currency of the United States, conversion shall be at the following rates.

January 1, 1986, holiday.

Brazil cruzeiro:	
January 3, 1986	N/A

(LIQ-03-01 S:COM CIE)

Dated: January 3, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-46)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Republic of South Africa rand:	
January 10, 1986	$0.41900

(LIQ-03-01 S:COM CIE)
Dated: January 10, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-47)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
January 14, 1986	N/A
January 15, 1986	$0.000089
January 16, 1986	.000089
January 17, 1986	.000089
Republic of South Africa rand:	
January 13, 1986	.42050
January 14, 1986	.42400
January 15, 1986	.42600
January 16, 1986	.43300
January 17, 1986	.43500
Spain peseta:	
January 17, 1986	N/A

(LIQ-03-01 S:COM CIE)
Dated: January 17, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-48)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New

York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

January 20, 1986, holiday.

Brazil cruzeiro:	
January 21–22, 1986	$0.000087
January 23–24, 1986	.000086
Republic of South Africa rand:	
January 21, 1986	.43700
January 22, 1986	.44000
January 23, 1986	.43730
January 24, 1986	.44150

(LIQ–03–01 S:COM CIE)

Dated: January 24, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–49)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
January 27, 1986	$0.000085
January 28–29, 1986	.000084
January 30, 1986	.000083
January 31, 1986	.000082
New Zealand dollar:	
January 27, 1986	.53150
January 29, 1986	.52900

January 30, 1986	.53900
January 31, 1986	.53550
Republic of South Africa rand:	
January 27, 1986	.44750
January 28, 1986	.43450
January 29–31, 1986	.43750

(LIQ–03–01 S:COM CIE)

Dated: January 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-1873)

OAK LAMINATES D/O OAK MATERIALS GROUP, APPELLANT *v.* UNITED STATES, APPELLEE

David O. Elliott, Barnes, Richardson and Colburn, of New York, New York, argued for appellant. With him on the brief was *Richard Haroian.*

Veronica A. Perry, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: United States Court of International Trade.

Chief *Judge* RE.

(Appeal No. 85-1873)

OAK LAMINATES D/O OAK MATERIALS GROUP, APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 11, 1986)

Before KASHIWA,* SMITH and NIES, *Circuit Judges.*

Per curiam.

Oak Laminates d/o Oak Materials Group (Oak Laminates) appeals from the decision in *Oak Laminates d/o Oak Materials Group* v. *United States,* No. 84-105 (September 25, 1984), *reh'g denied,* 601 F. Supp. 1031 (Ct. Int'l Trade 1984), in which Chief Judge Re of the United States Court of International Trade held that Oak Laminates had not overcome the presumption of correctness that attached to the Customs Service's classification of the merchandise imported by Oak Laminates. We affirm on the basis of these decisions.

AFFIRMED

*Judge Kashiwa retired on 7 January 1986. Before his retirement he participated in the consideration and decision of this case. Before Judge Kashiwa's retirement all members of the panel joined in this opinion.

498-400 O - 86 - 3

(Appeal Nos. 85-2246 and 85-2286)

ZENITH RADIO CORP., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

Frederick L. Ikenson, of Washington, D.C., argued for appellants Zenith. With him on the brief was *J. Eric Nissley*, of counsel.

Paul D. Cullen, Collier, Shannon, Rill & Scott, of Washington, D.C., argued for appellants IBEW. With him on the brief were *Paul C. Rosenthal* and *Lawrence J. Lasoff*.

Lawrence R. Walders, Graham & James, of Washington, D.C., argued for certain appellees. With him on the brief were *H. William Tanaka* and *Patrick O'Leary*. *Thomas P. Ondeck*, Baker & McKenzie, of Washington, D.C., for Hitachi, *Rodney F. Page* and *Robert H. Huey*, Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., for Toshiba, *Gail T. Cumins*, Sharretts, Paley, Carter & Balauvelt, of New York, New York, for Sanyo, *Robert D. Piliero* and *Peter J. Garland*, Wender, Murase & White, of New York, New York, for Sharp Electronics, *Stuart M. Rosen*, *A. Paul Victor*, *Charles H. Bayar* and *Bret E. Suval*, Weil, Gotshal & Manges, of New York, New York, for Matsushita Elec., and *Brian S. Goldstein* and *Edward B. Ackerman*, Siegel, Mandell, et al., for General Corp., etc., also on brief.

Sheila N. Ziff, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee U.S. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis*, Assistant Director.

Appealed from: U.S. Court of International Trade.

Judge WATSON.

(Appeal Nos. 85-2246 and 85-2286)

ZENITH RADIO CORP., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE INDENPENDENT RADIONIC WORKERS OF AMERICA, ET AL., APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

(Decided February 10, 1986)

Before FRIEDMAN, RICH and NIES, *Circuit Judges*.

NIES, *Circuit Judge*.

The subject of this suit is a final determination of the United States Department of Commerce, International Trade Administration (ITA), under § 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 *et seq.* (1982), which assessed antidumping duties on certain television receiving sets, monochrome and color, imported from Japan.[1] Zenith and other parties to this action[2] challenged

[1] The Final Determination is reported at 46 Fed. Reg. 30163-67 (1981).

[2] Suits were filed by Zenith Radio Corporation and by the Committee to Preserve American Color Television (a/k/a COMPACT), and Imports Committee, Tube Division, Electronic Industries Association. Those suits were consolidated before the CIT, and additional parties have subsequently been added. In the present appeals, No. 85-2246 is by Zenith and No. 85-2286 is by International Brotherhood of Electrical Workers, Independent Radionic Workers of America, and International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO. Appellants will be collectively referred to as "Zenith."

ITA's determination by filing a civil action in the United States Court of International Trade (CIT), alleging that, because of computation errors, ITA's determinations of dumping margins for various Japanese manufacturers were significantly understated. The CIT granted the government's motion for summary judgement, thus upholding ITA's determination, relying in part on this court's opinion in *Smith Corona Group Consumer Products Division, SCM Corp.* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984). This appeal is from the final judgment of the CIT, Watson, J., reported at 606 F. Supp. 695 (1985). We affirm.

OPINION

In this appeal, Zenith challenges two aspects of the CIT's decision: (1) the CIT's holding that the exporter's sales price (ESP) offset provision, 19 C.F.R. § 353.15(c) is lawful, and (2) the CIT's holding that the foreign market value may be adjusted by discounts and rebates which are not available to all purchasers at wholesale in the home market.

I

The validity of the ESP offset regulation was exhaustively considered by this court in *Smith Corona, supra.* There, the court addressed and rejected arguments comparable to those presently advanced by Zenith. In upholding the offset, this court stated:

> In view of the discretion accorded the Secretary under the statute to make adjustments to foreign market value, we conclude that the exporter's sales price offset, 19 C.F.R. § 353.15(c) is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly. Thus, insofar as it is challenged here, 19 C.F.R. § 353.15(c) is valid.

Id. at 1579. Thus, the CIT properly upheld the ESP offset in light of this precedent. This panel has considered Zenith's attack on that aspect of the *Smith Corona* decision. However, even if the panel were not bound by its precedential effect, we would reach the same conclusion.[3] The decision of the CIT upholding the regulation is, therefore, affirmed.

II

Zenith next asserts that Judge Watson erred in allowing the FMV to be adjusted downward by discounts and rebates that were not offered to all purchasers at wholesale. Zenith argues that discounts and rebates are related to price, and, as a consequence, must meet the requirements of § 1677b(a)(1)(A) if they are to be used in calculating the foreign market value (FMV). Under that

[3] Recognizing that under the operating procedures of this court, a decision by a prior panel is binding precedent on another panel, Zenith suggested that this case be considered in banc. This opinion has been circulated to the entire court prior to issuance, and no judge endorsed the suggestion.

section, the FMV calculation begins with the price at which the goods are sold or offered for sale in the foreign market. Section 1677(14)(A) further specifies that a qualifying price must be one that was offered to *all purchasers*. Therefore, Zenith concludes, discounts and rebates can only enter the FMV calculation if they are available to all purchasers. The subject discounts and rebates admittedly were not offered to all. Although the CIT opined that Zenith's interpretation of the statute is a plausible one, if correctly rejected Zenith's argument, again, on the basis of this court's decision in *Smith Corona*. On that point, it was held that discounts and rebates were properly deductible from FMV as "differences in the circumstances of sale." *Smith Corona, supra,* at 1580. Under § 1677b(a)(4)(B), an adjustment arising from a difference in circumstances of sale does not depend on availability to all purchasers. *See* 606 F. Supp. at 701.

Unlike the "ESP offset" issue, which Zenith concedes was decided by the court in *Smith Corona*, Zenith argues that *Smith Corona* did not decide the "differences in circumstances of sale" issue, which, it says, was not briefed by the parties in that case. Even though the court in *Smith Corona* clearly upheld the making of adjustments for rebates on the FMV side of the equation, Zenith maintains that the parties in that case focused only on the issue of whether the rebates were "directly related" to the sales, and did not otherwise challenge their deductability. Judge Watson was correct, however, in ruling that the question *was* necessarily decided in *Smith Corona*. The result reached by the court is clear, and resolution of the threshold question of whether adjustments for rebates could be made under § 1677b(a)(4)(B) was a necessary predicate to the court's analysis of the "directly related" issue. Moreover, we note that Zenith Radio Corporation (one appellant here) filed a brief as *amicus curiae* in the *Smith Corona* appeal, in which Zenith argued that the discounts or rebates there involved could not give rise to difference in circumstances of sale adjustments.[4] In any event, the issues revolved by a court are defined by the facts in the case and the law applied; they are not necessarily limited to those briefed by the parties.

The questions presented in this appeal are controlled by this court's decision in *Smith Corona*. Because Judge Watson correctly interpreted and applied that precedent to the facts of the present case, we affirm.

AFFIRMED

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[4] That Zenith argued the issue in the prior case is not controlling on our decision here. The authority cited by International Brotherhood of Electrical Workers strongly supports the proposition that the filing of an amicus brief is insufficient to bind a nonparty to the result of a proceeding. However, that principle simply has no application here, where *stare decisis*, not *res judicata*, is implicated. Zenith's amicus brief is noted simply as another indication that the issue was one which was present in *Smith Corona* and necessarily ruled on.

(Appeal No. 85-2271)

NORTH AMERICAN FOREIGN TRADING CORP., APPELLANT *v.* UNITED STATES, APPELLEE

James Caffentzis, Fitch, King & Caffentzis, of New York, New York, argued for appellant.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of Department of Justice, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General *David M. Cohen,* Director and *Jerry P. Wiskin.*

Appealed from: United States Court of International Trade.

Judge RESTANI.

(Appeal No. 85-2271)

NORTH AMERICAN FOREIGN TRADING CORP., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 10, 1986)

Before BALDWIN, *Circuit Judge,* MILLER, *Senior Circuit Judge,* and NEWMAN, *Circuit Judge.*

NEWMAN, *Circuit Judge.*

This appeal is from the judgment of the United States Court of International Trade holding that certain imported LCD digital alarm and/or melody watches were properly classified under item 688.36 of the Tariff Schedules of the United States and not eligible for duty-free treatment under 19 U.S.C. § 2463(c)(1) (B) and (C). The decision is affirmed on the basis of the opinion of the Court of International Trade, *North American Foreign Trading Corp.* v. *United States,* 600 F. Supp. 226 (1984), *reh'g denied,* 607 F. Supp. 1471 (Ct. Int'l Trade 1985).

OPINION

This is not a case of retroactive imposition of duty, because the goods in question had not been finally liquidated. Executive Order 12371 by its terms applied only to watches that had not been liquidated prior to the Order. 47 Fed. Reg. 30449, 30450 (1982). No vested right to a particular classification or rate of duty or preference is acquired at the time of importation. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 318 (1932); *United States* v. *Yoshida International, Inc.,* 526 F.2d 560, 580 (CCPA 1975).

In the case before us, the watches were not eligible for the benefits of the Generalized System of Preferences (GSP) at the time of

their importation, in accordance with 19 U.S.C. § 2463(c)(1) (B) and (C). The Court of International Trade correctly held that the duty classification resulting from the decision in *United States* v. *Texas Instruments*, 673 F.2d 1375 (CCPA 1982), did not affect the GSP treatment of the watches, whether of mechanical or solid state movement. Any doubt in this regard was clarified by Executive Order 12371.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul R. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–10)

ANSALDO COMPONENTI, S.P.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, WESTINGHOUSE ELECTRIC CORP., DEFENDANT-INTERVENOR

Court No. 84-9-01234

Before MORGAN FORD, *Senior Judge.*

PLAINTIFF'S MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AN AGENCY RECORD; DEFENDANT'S CROSS-MOTION TO AFFIRM THE AGENCY DETERMINATION

[Judgment for defendant; case dismissed.]

(Decided January 17, 1986)

Coudert Brothers (Sherman E. Katz, Robert A. Lipstein, Deborah A. Lewis) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Platte B. Moring, III); Gaylin Spoonis,* U.S. Department of Commerce; for the defendant.

Steptoe & Johnson (Richard O. Cunningham, W. George Grandison, Kevin J. Brosch and *Barbara A. Pollack)* for the defendant-intervenor.

FORD, *Senior Judge:* This action contests the final results of administrative review of an antidumping finding involving *Large Power Transformers from Italy* (49 Fed. Reg. 31313, August 6, 1984), conducted by the U.S. Department of Commerce, International Trade Administration (ITA), pursuant to section 751a of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a). Before the Court is plaintiff's (Ansaldo) motion, under Rule 56.1, for Judgment Upon Agency Record. Defendant and intervenor (Westinghouse) oppose said motion and seek affirmance of the administrative review under challenge. Jurisdiction is pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581c.

A review of the extensive background of this matter is essential to its disposition and warranted under the circumstances presented in this case. In 1970, Westinghouse filed an antidumping complaint

with the Department of Treasury [1] alleging that large power transformers from six countries were being sold in the United States at less than fair value and that a U.S. industry was being injured by those sales. The class or kind of merchandise was defined as all large power transformers rated 10 MVA or above, classified under items 682.0755, 682.0765 and 682.0775 of the Tariff Schedules of the United States. After conducting an investigation, the Department of Treasury found that large power transformers from Italy were being sold at less than fair value and ordered antidumping duties assessed against such entries. 37 Fed. Reg. 11772 (June 14, 1972). Among the companies affected by the dumping order was ASGEN, an Italian manufacturer and corporate predecessor of plaintiff Ansaldo.

In the early 1970's the transformer manufacturing assets of ASGEN were merged into Italtrafo, S.p.A. On July 1, 1976, the Customs Service sent a letter to Italtrafo requesting specific information on all transformers shipped to the United States after October 22, 1971, and for all home market and third country transformers for which it had accepted orders during the time period covered by dates of purchase of the United States units. On April 1, 1977, Italtrafo reported it had concluded only one contract with a United States customer since 1972, a 1973 order placed by Bonneville Power Administration (BPA I), and stated that records on identical or similar units ordered by third countries or by domestic customers could not be located. As a result, the Customs Service requested that Italtrafo supply information to enable it to appraise BPA I on the basis of constructed value.

On March 12, 1979, the U.S. Embassy in Rome notified the Customs Service of two Italtrafo transformer sales in 1974 to an importer in Puerto Rico. The Customs Service proceeded to request all pertinent information from Italtrafo during the period covering the Puerto Rican sales. Concurrent with this inquiry, the Customs Service determined that, as other Italtrafo transformers had been sold in Italy and to third countries, constructed value would not be an appropriate basis for appraisal of the U.S. entries. On November 15, 1979, Italtrafo provided information on the two 1974 sales in Puerto Rico and three home market sales.

Following the transfer of authority for administering the antidumping laws from the Treasury Department, the Commerce Department, in March, 1980, initiated a section 751(a) review of Large Power Transformers from Italy. On August 13, 1980, Commerce sent Italtrafo an antidumping questionnaire covering the period September 1, 1977 through June 30, 1980. A reply was requested within thirty days, and Italtrafo was cautioned that any undue delays or lack of response could result in the agency's proceeding on the basis of best information available.

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[1] Prior to the enactment of the Trade Agreements Act of 1979, the Department of Treasury had responsibility for the administration of U.S. antidumping duty laws.

On April 14, 1981, counsel for Italtrafo entered a notice of appearance in connection with the administrative review and informed Commerce that Italtrafo had become a division of Ansaldo, S.p.A. On May 19, 1981, more than nine months after the initial request for information by Commerce, counsel for Ansaldo submitted information concerning the 1973 BPA I sale and certain third country sales in 1973–74. No information or data on home market sales was contained in the submission. Ansaldo maintained it made no home market sales to unrelated purchasers within the meaning of 19 C.F.R. § 353.22(b) since all home market customers were related to Ansaldo through a complex chain of government ownership. Instead, Ansaldo argued the review should proceed on the basis of third country sales. A subsequent submission provided a list of Ansaldo's home market and third country customers for the 1972–74 period, but contained no price information and offered no explanation of the relationship between Ansaldo and its home market customers.

On July 1, 1981, Commerce requested information from Ansaldo for the period July 1, 1980 to May 31, 1981, including information on shipments entered before these dates if not previously supplied, and requested a response within thirty days. Three months later, on October 5, 1981, Ansaldo reported it had made no U.S. sales during the period covered by the questionnaire and provided no home market information.

Commerce published a notice of preliminary results of administrative review on April 13, 1982. This notice covered the period from May 2, 1974 through June 10, 1980. The notice stated the ITA was postponing appraisement pending receipt of additional information from Ansaldo. In written comments to the preliminary results, submitted on May 12, 1982, Ansaldo asserted that "the Department has had since June 9, 1981, a complete listing of *all* Ansaldo/Italtrafo sales of *all* markets, *home* and export, for the period of time the Department deemed relevant."

On June 17, 1982, Commerce requested information from Ansaldo for the period June 1, 1981 to May 31, 1982. Again, Commerce sought information on shipments entered before these dates if not furnished in a previous response. Similarly, the questionnaire requested a reply within 30 days and cautioned that undue delay or insufficient response could result in the agency's use of the best information available. On September 22, 1982, Ansaldo, as in the preceding review, reported no sales for the period covered by the questionnaire.

Ansaldo was notified, on September 15, 1982, that the ITA has not resolved the issue of whether home-market sales or third country sales would be used to determine foreign value. Ansaldo was requested to submit further data on home market sales, even if the sales were between related parties. In response, Ansaldo argued that all its home-market sales were to related parties. Ansaldo con-

tended the only comparable transformer sales were of units with a rating of 100 MVA or higher, and that all home market sales in this category were to related parties. Ansaldo did submit data for home-market sales for the 1972–74 period, but limited its submission to the category of sales it deemed comparable.

On February 25, 1983, Commerce advised Ansaldo its response had been inadequate insofar as it related to data on all transformers with a rating of 10 MVA or above. In addition Ansaldo should have provided sales information for the periods subsequent to 1974. Ansaldo, on March 11, 1983, submitted a list of home-market sales for the period 1975–79, but the listing did not include the price information necessary for Commerce to analyze price comparability. The ITA casehandler notified Ansaldo, on March, 1983, that its submission was deficient and Commerce was proceeding on the basis of best information available.

Twice thereafter, on April 8 and again on April 22, 1983, Commerce requested more detailed information on specific home-market sales from Ansaldo. A deadline of May 9, 1983 was extended to July 8, 1983. In the interim, Commerce announced it had established a procedure for selecting home-market units for comparison with units sold to the United States.

Ansaldo's reply to Commerce on July 7, 1983, stated, in part:

> As the information requested * * * cannot legally serve as a basis for the Department's administrative review, requiring that such information be developed by Ansaldo and provided to the Department would impose an unreasonable and unnecessary burden on the company.

Commerce continued to obtain information concerning U.S. imports of transformers sold by Ansaldo from both the Customs Service and Westinghouse. At the same time, Commerce commenced a large-scale study to refine its methodology for use in analyzing U.S. price and foreign market value in all the administrative reviews of large power transformers. The ITA wrote letters, received briefs, and conducted hearings involving all the parties in the transformer proceedings. After analysis of the information received, Commerce, on December 14, 1983, announced the methodology it would use for its determinations and initiated a revised preliminary review of transformers sold by Ansaldo.

By letter dated December 12, 1983, Commerce indicated to Ansaldo its intention to review the four Ansaldo/Italtrafo sales to the United States: BPA I, the two sales in Puerto Rico, and another sale to the Bonneville Power Administration in 1979, BPA II. The agency outlined the information it had received on the first three sales and noted it had received no information on the 1979 BPA II transformer sale. Specific information was requested for a number of Ansaldo home market sales deemed similar to the U.S. sales, and Ansaldo was invited to submit information on other sales it deemed comparable. The ITA had decided that sales between Ital-

trafo and its customers in the home market were sales between unrelated parties in light of the relationship between them. Ansaldo was asked to provide the requested information no later than December 30, 1983, and cautioned that:

> We will not accept partial submissions and failure to provide * * * complete information may result in our not using other information submitted.

On January 10, 1984, counsel for Ansaldo requested a two-month extension of time to prepare a response to the Commerce letter of December 12, 1983. The ITA reply to this request indicated the information was past due and that failure to submit the information by January 27, 1984, would result in Commerce using the best information otherwise available to complete the review.

The information sought from Ansaldo was not provided by the January 27, 1984 deadline. On March 9, 1984, Commerce supplied Ansaldo with an advance copy of the Federal Register notice to be published March 16, 1984. The notice stated:

> Italtrafo failed to provide an adequate response to requests for information. For this firm the Department used the best information available to determine the assessment and estimated antidumping duties cash deposit rates.

A disclosure conference was held on March 19, 1984, at the request of counsel for Ansaldo. At that meeting, the ITA explained the best information available was derived from three sources: (1) information obtained during the Treasury Department's fair value investigation; (2) information provided by the petitioner, Westinghouse; and (3) information supplied by the U.S. Customs Service.

Commerce scheduled a hearing on the revised preliminary results for May 8, 1984, again at Ansaldo's request. Prior to the hearing, Ansaldo submitted documents which, for the first time, provided the contract and specifications for the 1979 BPA II transformer sale. At the hearing Ansaldo accepted some of Commerce's margin calculations while objecting to others and requesting certain additional adjustments.

After considering Ansaldo's objections and comments, the ITA consulted a technical expert on the BPA II unit and the Italian home market unit selected for comparison on the best information available analysis. The technical expert confirmed that data obtained directly from the Bonneville Power Administration substantially corroborated the information submitted to Commerce by Westinghouse in its March 24, 1983 best information submission.

In the final results of administrative review of *Large Power Transformers from Italy*, 49 Fed. Reg. 31313 (August 6, 1984), the ITA declined to make several of the adjustments proposed by both Ansaldo and Westinghouse but submitted after publication of the revised preliminary results. Ultimately the U.S. Customs Service was instructed to assess dumping duties and require a cash deposit

of estimated antidumping duties, at the rate specified by Commerce,[2] on entries of large power transformers manufactured by Ansaldo. In defending its use of the best information available, the agency stated, at Comment 1:

> The statute and regulations provide for the use of best information otherwise available in the context of investigations and section 751 reviews. We must resort to use of best information otherwise available when a party refuses or is unable to supply the Department with adequate information in a timely manner. We agree with Italtrafo that the Department is not required to rely exclusively on information supplied by the petitioner; in fact, we did not rely solely on information provided by Westinghouse. Here, we used certain information provided by the Treasury Department during the fair value investigation in this case and other information provided by the petitioner and the Customs Service. We did not use new information submitted by Italtrafo after publication of the revised preliminary results. Our refusal to use Italtrafo's information is based on Italtrafo's failure to submit adequate information in a timely manner in this review. The fact that the Department's regulations do not specify absolute time limits for submission of information does not nullify the Department's authority to refuse to use selected new information submitted after publication of preliminary results of our review. Clearly the Department, which must make a determination on the administrative record, must, at some time prior to a final determination, establish a point at which information submitted by parties can no longer be considered for purposes of reaching that final determination. Otherwise, we could not fully and properly take into account all the information submitted, or ensure a reasonable opportunity to comment by all interested parties. Parties could effectively delay and frustrate the review process by repeated, untimely piecemeal submissions.
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> Further, the Department must be able to use the best information otherwise available when a respondent chooses to provide only selected new information at a time so late in the review process that its consideration would cause serious delay and expense to the Department and interested parties. Despite repeated requests, Italtrafo did not furnish the requested information until one week before the hearing, and then furnished only selected new information to supplement the Department's best information.
>
> Accordingly, the Department has properly declined to take such information into account. Specifically, the Department has not considered new information submitted concerning physical characteristics of the transformers, testing, supply of oil, escalation payments, shipment dates, warranties, payment schedules, and packing expenses.

[2] Commerce determined the BPA I unit and the two units sold in Puerto Rico had been sold at less than fair value by a margin of 9 percent, and the BPA II unit had been sold at less that fair value by a margin of 92.47 percent.

It is from this determination and agency record that plaintiff presently moves for judgment under Rule 56.1.

Plaintiff has challenged the Commerce determination of the dumping margin with respect to the BPA II transformer sale covered by the third review period. Ansaldo attacks the final results of administrative review on four bases: (1) Commerce erred when it determined Ansaldo and its principal home-market customer (ENEL) were unrelated; (2) Commerce's calculation of foreign market value by reference to an Ansaldo sale to ENEL was erroneous as a matter of law and unsupported by substantial evidence on the record; (3) Commerce acted arbitrarily and capriciously, and not in accordance with law, when it rejected information submitted by Ansaldo after publication of the preliminary determination; and (4) the refusal of Commerce to verify the information submitted by Ansaldo was incorrect as a matter of law.[3]

Defendant and intervenor, Westinghouse, oppose plaintiff's motion on several grounds. Defendant maintains Ansaldo refused to produce information in a timely manner and the ITA thus properly refused to consider plaintiff's submissions after publication of the revised preliminary results. Consequently, defendant argues, the ITA acted in accordance with law in reaching its determination of final results on the basis of the best information available. Westinghouse augments defendant's position and argues further that home market sales to ENEL were properly used in determining the foreign market value for Ansaldo transformers.

As framed by plaintiff, the principal issue presented by this review is the question of whether related party sales in the home-market should be used in determining foreign market value in an administrative antidumping proceeding. While this premise is not determinative in the outcome of this case, its importance merits elucidation, if not resolution, in the present analysis.

Although certain conclusions can be drawn from the record of this proceeding, it is significant that, at this late date, the exact nature of the relationship between Ansaldo (and its predecessor, Italtrafo) and ENEL, Ansaldo's principal home-market customer, remains unclear. Ansaldo, formerly Italtrafo, is controlled by Finmeccanica, S.p.A., which in turn is held by the Institute for Industrial Reconstruction (IRI). IRI is owned by the Italian Government. ENEL, Italtrafo's major purchaser, is the state electric utility and is administered by the Italian Ministry of Industry.

During the course of the underlying review, plaintiff submitted statements which, if accepted as fact, outline a pattern of common ownership and control between Italtrafo and ENEL. Both companies were financially controlled, under various entities, by the Italian Government. There was no competitive bidding between Ansaldo and other home-market manufacturers for sales to ENEL.

[3] The "best information rule" is an explicit exception to the verification requirement. 19 U.S.C. § 1677e(a).

Future contracts were allocated, and prices were established, on a predetermined basis. Taken together, plaintiff's statements allege a related party relationship between Italtrafo and ENEL within the meaning of 19 CFR § 353.22(b) and section 771(13) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(13).

Under 19 CFR § 353.22(b), sales between related parties "ordinarily will not be used in the determination of foreign market value unless such sales are demonstrated to the satisfaction of the Secretary to be at prices comparable to those at which such or similar merchandise is sold to persons unrelated to the seller."

A dispute concerning whether to use related party home-market sales in determining foreign market value ordinarily arises in a different context. It is usually the domestic petitioner who objects to the use of such data in agency formulations. Related party home-market sales tend to be lower in price because related companies generally decrease prices to each other to the advantage of the principal entity. The present situation reflects the opposite scenario. Westinghouse seeks inclusion of the related party home-market sales data, alleging Ansaldo uses home-market sales at very high prices to subsidize exports to the United States at sharply lower prices. For its part, Ansaldo maintains its relationship with ENEL permitted Ansaldo to charge artificially high, nonmarket prices to ENEL in order to permit the government of Italy, through its various divisions and holdings, to implement national and regional social policies.[4]

The respective parties have advanced several arguments involving the use of related party home-market sales data in the antidumping schema. However, a definitive resolution of this issue need not be reached in the case at bar. Instead, the Court is compelled to resolve this matter on a more fundamental basis, the grounds for which are clearly evident upon review of the administrative record.

Under 19 U.S.C. § 1673, if the price for goods in the United States is less than the foreign market value of the goods, the difference between the two is the margin of dumping in the United States and antidumping duties must be paid to offset it. The determination of foreign market value begins with price in the producer's home market. 19 U.S.C. § 1677b(a)(1)(A). If home-market sales are inadequate for comparison, the foreign market value can be determined using either sales to third countries other than the United States (19 U.S.C. § 1677b(a)(1)(B)) or a non-price method known as constructed value, in which the value is determined from the costs of materials, the cost of production, general expenses and profit. 19 U.S.C. § 1677b(a)(2) and (e). *Zenith Corp.* v. *United States*, 9 CIT ——, Slip Op. 85-30 (March 13, 1985).

[4] For example, Ansaldo claims ENEL was willing to pay a premium for transformers manufactured in southern Italy in order to alleviate regional unemployment.

The U.S. Department of Commerce, specifically the ITA, is charged, under the Trade Agreements Act of 1979, with the administration of the antidumping laws. In conducting reviews under section 751(a), the ITA requests pertinent information from those who will be affected by the results of the review. In order to comply with the requirements of the statute, the ITA provides participants a specified period in which to provide the information requested. After this period expires, the ITA must refuse to consider untimely submitted information and instead rely on the best information available. *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556 (1984); *UST, Inc.* v. *United States,* 9 CIT ——, Slip Op. 85–78 (July 31, 1985).

19 U.S.C. § 1677e(b) provides:

> (b) Determinations to be made on best information available. In making their determinations under this title [19 USCS § 1671 et seq.], the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Review of the administrative record reveals a consistent pattern of unresponsive, insufficient, and untimely submissions by Ansaldo to repeated attempts by Commerce to elicit information pertinent to the underlying reviews. Based on the evidence before the Court, Ansaldo's failure to furnish the information requested completely justified the Commerce Department's use of the best information available under 19 U.S.C. § 1677e(b). Accordingly, for the reasons set forth below, the Court finds for the defendant and affirms the results of the administrative review.

As previously noted, plaintiff has limited its challenge to the dumping margin determination pertaining to the 1979 BPA II transformer sale. Commerce first learned of the BPA II sale from Westinghouse in February of 1980. Thereafter, beginning on August 13, 1980, Commerce requested, on three separate occasions, information pertinent to the BPA II and any other sales during the relevant periods. In response to these requests, Ansaldo asserted it made no home-market sales to unrelated parties. Ansaldo did submit (untimely) information on the 1973 BPA I sale and certain third country sales in 1973–74. However, neither home-market sales data nor price information of any kind was provided in these submissions. Finally, on May 1, 1984, Ansaldo provided information intended to supplement Commerce's best information available determination on the BPA II sale. As the revised preliminary results of administrative review had already been published (March 16, 1984), Commerce rejected Ansaldo's submission as untimely and instead relied on the data accumulated on the basis of best information available.

The administrative record indicates Ansaldo was either conspicuously uncooperative with Commerce during the course of the underlying reviews or laboring under severe misconceptions as to the administrative procedure involved in the administration of U.S. antidumping law. Initially, the Court observes that neither the Treasury Department nor Commerce ever received a response from Ansaldo by the requested date. This fact, in and of itself, provides sufficient basis to sustain Commerce's use of the best information available. Section 751 reviews are conducted and must be completed within specific time-frames. The procedures involved in these reviews make it imperative the requested information be submitted within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines. As in the present case, when the information requested is not timely provided, Commerce has no choice but to proceed with its review and reach its determinations using the best information available. *UST, Inc.* (supra).

Of equal concern to the Court is plaintiff's propensity to draw conclusions of both factual and legal significance on matters properly within Commerce's domain. The administrative record discloses several instances in which Ansaldo chose not to submit the information requested because Ansaldo had concluded such information could not serve as a basis for Commerce's administrative review. It was Ansaldo that concluded all its home-market customers were related parties and thus refused to submit home-market sales data. It was Ansaldo that concluded the administrative review should proceed on the basis of third country sales. It was Ansaldo that concluded the only comparable transformer sales were of units with a rating of 100 MVA or higher when Commerce requested information on units with a rating of 10 MVA or higher. Finally, it was Ansaldo that concluded furnishing home-market and U.S. sales price data imposed an "unreasonable and unnecessary burden on the company." Such conclusions, reached unilaterally with no foundation in statute or administrative practice, are inherently flawed. It is Commerce, not the respondent, that determines what information is to be provided for an administrative review.

The net effect of Ansaldo's failure to submit the requested information, based on its own conclusory assertions, was to preclude Commerce's analysis and consideration of the merits of Ansaldo's arguments. Ansaldo provided no information upon which Commerce could have determined the U.S. price of the BPA II transformer. Similarly, the ITA had insufficient information to determine the foreign market value of BPA II, which necessarily begins with the price in the producer's home market. Although Ansaldo did provide third country sales data for the review period covering the BPA I sale and the two sales in Puerto Rico, the data submitted for the period covering the BPA II sale was inadequate, and

Commerce was unable to determine the foreign market value using third country sales methodology. Additionally, Ansaldo provided no independent evidence of the exact nature of its relationship with its home-market customers. In the event Commerce had accepted the argument that Ansaldo was "related" to its home-market customers, Ansaldo provided no home-market sales data which Commerce could have used in an evaluation of price comparability of sales to related and unrelated parties. These facts indicate a failure, on Ansaldo's part, "to produce information requested in a timely manner and in the form required", and under the circumstances Commerce's resort to the best information available was entirely justified. 19 U.S.C. § 1677e(b).

In so ruling, the Court seeks to encourage the cooperation of participants to the reviews conducted at the administrative level. The relationship between administrative participants and the agency involved ought not be adversarial in nature. This is particularly true where, as in this case, the role of the agency is administrative rather than quasi-judicial. Indeed, as the result in this case demonstrates, the information sought by the agency must be provided in order to assure its full consideration before both the agency and the reviewing court. The Court is aware that information sought in section 751 reviews may have a significance wholly independent from its proffered use, and respondents may be reluctant to share material they deem irrelevant to such reviews. However, the consequence of failing to provide adequate and timely information is to leave Commerce with no alternative but to proceed with its review relying upon the best information available. Simply stated, to ensure the agency's full consideration of their position and rights under the antidumping law, respondents must comply with procedural guidelines and thereby afford themselves the opportunity to respond and participate in the review in a meaningful manner.

Accordingly, the Court finds the Commerce determination to conduct the review using the best information available to be fully supported by substantial evidence on the record and otherwise in accordance with law. The final results of the administrative review involving *Large Power Transformers from Italy* (49 Fed Reg. 31313, August 6, 1984) are therefore affirmed, and this action is hereby dismissed. Judgment will be so entered.

(Slip Op. 86-11)

UNITED STATES, PLAINTIFF *v.* ROCKWELL INTERNATIONAL CORP., DEFENDANT

Court No. 82-12-01744

Before DICARLO, *Judge.*

Defendant moves for summary judgment on both charges in action alleging merchandise was entered (1) by means of material and false statement and (2) by means

of material omissions in negligent violation of 19 U.S.C. § 1592. Plaintiff cross-moves for summary judgment on charge alleging entries based upon material and false statement.

Defendant's motion for summary judgment on material omissions charge is precluded by the existence of a genuine issue of material fact. On the material and false statement charge, the Court holds that defendant filed a false statement and that the statement is material within the meaning of section 1592. A genuine issue of material fact precludes a finding on the question whether the material and false statement was filed as a result of negligence.

[Defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted in part.]

(Decided January 22, 1986)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*A. David Lafer*) for plaintiff.

Glad & Ferguson (Edward N. Glad) for defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* The United States brings this action against defendant Rockwell International Corporation (Rockwell) to recover a civil penalty for alleged negligent violations of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982). The complaint alleges that 223 entries of nickel cadmium batteries imported from Mexico over a one year period were entered by means of material and false statement and by means of material omissions.

Rockwell moves under Rule 56 of the Rules of this Court for summary judgment on material and false statement and material omission charges. The government opposes Rockwell's motion and cross-moves for summary judgment on the material and false statement charge. Rockwell's motion is denied and plaintiff's motion is granted in part.

Uncontroverted Facts

The following facts are not in dispute:

Beginning in late 1977, Rockwell imported at Calexico, California, pin ball machine control boards assembled in Mexico, each containing a small nickel cadmium battery. The control boards were imported under item 807.00, Tariff Schedules of the United States (TSUS), as "[a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States * * *." Item 807.00, TSUS, imposes a duty upon the full value of the imported article, less the cost or value of United States components. The entries listed in the complaint contained a total of 51,995 batteries, each having a dutiable value of $2.30.

The estimated duties deposited by Rockwell in connection with the control board entries were calculated on the basis of an estimated declaration of assembly costs filed by Rockwell with the United States Customs Service (Customs) on November 21, 1977. The estimated declaration listed the components of the control

boards and indicated whether they were United States or foreign origin.[1] The declaration listed the batteries as components of United States origin. The batteries had actually been manufactured in Mexico and sold to defendant by the General Electric Company.

Each battery was marked "assembled in Mexico." Rockwell never physically inspected the batteries prior to their exportation to Mexico for assembly into the control boards. Rockwell never received, or does not recall receiving, an executed origin of manufacturing declaration from General Electric.

The country of origin of the batteries was not made known to Customs until on or about March 27, 1979, when Rockwell filed a revised estimated declaration of assembly costs in which the batteries were shown to be of foreign origin.[2]

Discussion

The complaint alleges that the batteries were entered in violation of 19 U.S.C. § 1592(a)(1)(A)(i) by means of material and false statements on the estimated declaration of assembly costs and entry documents. The complaint also alleges that the batteries were entered by means of material omissions in violation of section 1592(a)(1)(A)(ii) on the grounds than the batteries were dutiable separately from the control boards and should have been listed on a separate line on the entry papers.

On its motion for summary judgment, Rockwell argues (1) the action is barred by the applicable statute of limitations because it was commenced more than five years after the filing of the estimated declaration of assembly costs on November 21, 1977, (2) the entry documents contain no false statements and the false statement contained in the declaration of estimated assembly costs is not material within the meaning of section 1592, (3) the entries were not made by means of material omissions since the control boards and batteries were entireties, and (4) the false statement was not filed as a result of negligence.

The government opposes Rockwell's motion of summary judgment on the material and false statement charge and the material omissions charge, and cross-moves for summary judgment on the material and false statement charge. On its cross-motion for summary judgment, the government argues (1) the timeliness of the action is governed by the entry dates, (2) Rockwell's motion for

[1] 19 C.F.R. § 10.24 (1977) provides that in connection with the entry of assembled articles claimed to be subject to exemption under item 807.00, TSUS, the assembler of the articles must file a declaration setting forth the components which are products of the United States. The declaration must be accompanied by an endorsement by the importer attesting to the correctness of the information provided on the declaration. *Id.* § 10.24(2). 19 C.F.R. § 10.24(g) states:

> *Responsibility of correctness.* Subject to the civil and criminal sanctions provided by law for false or fraudulent entries, the importer has the ultimate responsibility for supplying all information needed by the Customs Service to process an entry, and for the completeness and truthfulness of such information. If certain information cannot be supplied by the assembler, it must be provided by the importer.

[2] Rockwell does not claim to have disclosed the circumstances of the alleged violations in accordance with the prior disclosure provisions of section 1592. *See* 19 U.S.C. § 1592(c)(4) (1982).

summary judgment on the material omissions charge is precluded by the existence of a genuine issue of material fact, (3) the entries were made by means of a false statement because the value of the batteries was listed as nondutiable in the estimated declaration of assembly costs, (4) the false statement is material, and (5) Rockwell was negligent in filing the material and false statment.

The timeliness of this action is governed by 19 U.S.C. § 1621 (1982), which in relevant part states:

> That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed.

Under this section, the five year limitations period begins to run upon the commission of the alleged violation of section 1592. Section 1592 prohibits, *inter alia,* the entry of merchandise into the commerce of the United States by means of any document which is material and false. 19 U.S.C. § 1592(a)(1)(A). Therefore, the timeliness of the action is determined not be the date on which the estimated declaration of assembly costs was filed, but rather by the dates on which Rockwell entered the merchandise.

This action is timely since the entries which are the subject of the complaint occurred less than five years prior to commmencement of the action.

With respect to Rockwell's motion for summary judgment on the material omissions charge, both parties have submitted affidavits as to whether the batteries were soldered into the control boards. This question is material to whether the control boards and batteries were entireties, and the entireties issue is material to whether the batteries were negligently omitted from a separate line on the entry documents. Since the affidavits raise a genuine issue of material fact, Rockwell's motion for summary judgment on the material omissions charge is denied.

The Court next turns to the parties' cross-motions for summary judgment on the government's allegation that Rockwell, by negligence, entered the batteries by means of a material and false statement. Rockwell admits that it filed a document containing a false statement with Cutoms, saying: "The only false statement that appears in any paper filed with U.S. Customs is contained in the initial estimated declaration of dutiable costs filed with U.S. Customs by defendant on November 21, 1977, wherein the recharageable batteries were stated to be of U.S. origin when in fact these batteries were foreign." [3] Since estimated duties on the entries were calculated based upon the estimated declaration of assembly costs, and the estimated declaration listed the battery components as nondutiable, the batteries were entered by means of false statement.

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[3] Defendant's Memorandum in Support of its Motion for Summary Judgment, at 1.

The Court now addresses whether genuine issues of material fact preclude resolution of the questions (1) whether the false statement was material, and (2) whether the false statement was negligently filed.

A question of materiality involves a legal issue to be decided by the Court. *See, e.g., Sinclair* v. *United States,* 279 U.S. 263, 298–99 (1929); *United States* v. *Ackerman,* 704 F.2d 1344, 1347, *reh'g denied,* 719 F.2d 1283 (5th Cir. 1983). "In determining whether a false statement is material, the test is whether it has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *United States* v. *Krause,* 507 F.2d 113, 118 (5th Cir. 1975) (citing *Blake* v. *United States,* 323 F.2d 245, 246 (8th Cir. 1963); *Gonzales* v. *United States,* 286 F.2d 118, 122 (10th Cir. 1960)). The Court also notes that in 1984 Customs issued a definition of materiality under section 1592, which states in part: "A document, statement, act, or omission is material if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty * * *." 19 C.F.R. App. B to Pt. 171 (1984).

In this case, the Court holds that the measurement of the materiality of the false statement is its potential impact upon Customs determination of the correct duty for the imported merchandise. *Cf. United States* v. *Taylor,* 574 F.2d 232, 235. *reh'g denied,* 576 F.2d 931 (5th Cir.), *cert. denied,* 439 U.S. 893 (1978). Under this standard, a statement is material which identifies components to be of United States origin and nondutiable, when in fact the components are foreign and had an aggregate dutiable value of over $119,000.

Rockwell argues its false statement is not material because the only purpose for listing country of origin data is to arrive at a sum that represents the estimated dutiable cost. The Court disagrees. While the dutiable values of components listed in estimated declarations may reasonably be expected to represent only estimations, *see* 19 C.F.R. § 10.21 (1977), the primary purpose of filing documentation in connection with foreign assembly operations is to ascertain which components are dutiable and which are not.[4] Although Rockwell argues that the false statement is not material because it overestimated its duties on the control boards, section 1592 is expressly applicable "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby." 19 U.S.C. § 1592(a)(1).

The final issue is whether there exists a genuine issue of material fact on the question of negligence. 19 U.S.C. § 592(c) states in part:

> if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator

[4] *See* 19 C.F.R. § 10.24 (1977); *supra,* note 1.

> shall have the burden of proof that the act or omission did not occur as a result of negligence.

Since the act alleged to constitute a violation of section 1592 has been established, section 1592(c)(4) places upon Rockwell the burden of proving that the filing of the false statement did not occur as a result of negligence.

Rockwell contends that it was not negligent since it adopted reasonable procedures in order to comply with Customs requirements applicable to foreign assembly operations. Rockwell states that its internal regulations require the furnishing of country of origin certificates to suppliers so that accurate country of origin information can be received. Rockwell argues that in this case it did not receive country of origin certification, but since its supplier was located in the United States, it could reasonably assume that the batteries were of United States origin.

The Court does not comment on the merit of Rockwell's contentions, but finds that it has raised a genuine issue of material fact on the question of negligence.[5] "Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Albert* v. *Kevex Corp.*, 729 F.2d 757, 762, *reh'g granted*, 741 F.2d 396 (Fed. Cir. 1984). Summary judgment on the question of negligence is denied.

Conclusion

Rockwell's motion for summary judgment on the material omissions charge is precluded by the existence of a genuine issue of material fact.

On the material and false statement charge, Rockwell's motion for summary judgment is denied and the government's cross-motion for summary judgment is granted in part. The Court finds that Rockwell filed the false statement giving rise to the alleged violations, and holds that the false statement is material within the meaning of section 1592. Under Rule 56(e) of the Rules of this Court, the uncontroverted facts set forth in this opinion shall be deemed established with respect to the triable issue of negligence. A conference will be held within ten days to discuss the manner in which the action shall proceed. So ordered.

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[5] The Court is aware of no case which defines negligence under section 1592. However, negligence has been defined in the context of another federal penalty statute as "lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." *Marcello* v. *Comm'r*, 380 F.2d 499, 506 (5th Cir. 1967) (penalty of negligence underpayment of taxes, § 6653(a) of the Internal Revenue Code of 1954, [current version at 26 U.S.C. § 6653(a) (1982)]., *cert. denied*, 389 U.S. 1044 (1968); *see Zmuda* v. *Comm'r*, 731 F.2d 1417, 1422, (9th Cir. 1984). In 1984, a definition of negligence under section 1592 was published in an appendix to the Customs Regulations. Customs definition states in part: "As a general rule, a violation is determined to be negligent if it results from the the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct." 19 C.F.R. App. B to Pt. 171 (1984).

(Slip Op. 86-12)

WILLIAM D. BAILEY & FRANK WASSON, D/B/A BAILEY & WASSON TRADING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-10-01437

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff contended that Rolex watches imported from Switzerland and Hong Kong were improperly appraised on the basis of export value, and should have been appraised on the basis of United States value.

Held: Plaintiff has not introduced evidence to show that the merchandise was improperly appraised, and, therefore, failed to rebut the presumption of correctness that attaches to the government's determination.

[Judgment for defendant.]

(Decided January 23, 1986)

John R. Heard, at the trial and on the brief, for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin,* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper valuation, for customs duty purposes, of certain Rolex watches and watch bracelets imported from Switzerland and Hong Kong. The watches are comprised of three components: the watch case, the watch movement, and the watch band or strap.

The Customs Service appraised the merchandise on the basis of export value, in accordance with section 402(b) of the Tariff Act of 1930, 19 U.S.C. § 1401a(b) (1976) (amended 1979). Plaintiff contends that export value was an improper basis of valuation, and that the imported merchandise should have been appraised on the basis of United States value, pursuant to 19 U.S.C. § 1401a(c). Plaintiff also contends that the valuation was based on an inappropriate allocation of value among the various components of the imported merchandise.

The Tariff Act defines export value as:

> the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Tariff Act of 1930 § 402(b), 19 U.S.C. § 1401a(b) (1976) (amended 1979).

The portion of the Act which pertains to United States value provides that:

> For the purposes of this section, the United States value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal market of the United States for domestic consumption, packed ready for delivery, in the usual wholesale quantities and in the ordinary course of trade, with allowances made for—
>
> (1) any commission usually paid or agreed to be paid, or the addition for profit and general expenses usually made, in connection with sales in such market of imported merchandise of the same class or kind as the merchandise undergoing appraisement;
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> (2) the usual costs of transportation and in surance and other usual expenses incurred with respect to such or similar merchandise from the place of shipment to the place of delivery, not including any expenses provided for in subdivision (1) of this subsection; and
>
> (3) the ordinary customs duties and other Federal taxes currently payable on such or similar merchandise * * * for which vendors at wholesale in the United States are ordinarily liable.

Tariff Act of 1930 § 402(c), 19 U.S.C. § 1401a(c) (1976) (amended 1979).

Upon liquidation, the imported merchandise was appraised at the actual price by plaintiff. Plaintiff asserts that the United States value of the merchandise would be 39 percent of the United States retail price of the watches.

The question presented is whether, within the meaning of the pertinent statutory provisions, the proper basis for violation of the imported merchandise is export value, as determined by Customs, or United States value, as claimed by plaintiff.

After a careful examination of the evidence adduced at trial, the arguments of the parties, and the relevant case law, it is the determination of the Court that plaintiff has not overcome the presumption of correctness that attaches to the government's determination. *See* 28 U.S.C. § 2639(a)(1) (1982); *Diamax Hawaii, Ltd.* v. *United States*, 4 CIT 162, 165–66 (1982). Therefore, the valuation of the imported merchandise by the Customs Service is affirmed.

At trial, the Court heard the testimony of plaintiff's only witness, Mr. William D. Bailey, an owner of Bailey and Wasson Trading Company (Bailey & Wasson). Mr. Bailey testified that Bailey & Wasson imported Rolex watches from 1978 through 1981. Since Bailey & Wasson was not a licensed franchise dealer of Rolex watches, it could not purchase watches from Rolex's exclusive distributors. Consequently, Bailey & Wasson purchased the watches from businesses that had obtained them from an exclusive distribu-

tor. In turn, Bailey & Wasson would sell the watches to domestic retailers.

Mr. Bailey also testified that Customs' allocation of value to the watch case, movement, and band was incorrect. However, he was unable to suggest an alternative allocation, and stated that Bailey & Wasson relied on the allocations provided by the seller of the watches in Switzerland.

During the course of Mr. Bailey's testimony, plaintiff introduced five exhibits into evidence. Plaintiff's exhibits pertained to the importation of Rolex watches purchased from Bucherer Co., Ltd., of Lucerne, Switzerland, a licensed dealer of Rolex watches. One of plaintiff's exhibits consisted of an invoice for 10 watches sold by Bucherer to Bailey & Wasson. Mr. Bailey, on cross-examination, testified that the invoice provided by Bucherer did not reflect the actual price paid by Bailey & Wasson, but undervalued or understated the price actually paid for the watches. On cross-examination, Mr. Bailey also stated that Bailey & Wasson, during 1978 to 1980, resold imported watches to retail jewelers. In addition, he admitted that Bailey & Wasson was a substantial importer of watches from Hong Kong during the relevant period.

At trial, defendant introduced into evidence a copy of a request for admissions, which were deemed admitted pursuant to Rule 36 of the Rules of this Court. The admissions stated:

> 1. For each of the entries covering merchandise exportations from Hong Kong * * * the country of exportation for purposes of appraisement is Hong Kong rather than Switzerland.
> 2. At the time of exportation of the merchandise covered by the entries * * * such or similar merchandise was freely sold or offered for sale in Hong Kong for exportation to the United States.
> 3. Sales by Bucherer to Bailey & Wasson were sales to purchasers at the wholesale level.

In its post-trial brief, plaintiff devotes its entire arguments to its contention that it "encountered substantial difficulties in obtaining necessary factual information to support the exact amount of additional [duties it] paid." Hence, as an alternative to a judgment granting the relief sought, it requests post-trial discovery.

The defendant submits that plaintiff's request for post-trial discovery is without foundation in law and is improper. It also contends that plaintiff has failed to sustain its burden of proving that the appraisements were incorrect.

Plaintiff has not shown any basis for its request for post-trial discovery. In its brief, plaintiff states that "discovery was sought from the Government in this matter, without success," and that its request for documents under the Freedom of Information Act (FOIA) was denied by the Customs Service. Plaintiff's proper remedy to an objection to discovery is to move to compel pursuant to Rule 37(a) of the Rules of this Court. *See J.M. Cleminshaw & Co.* v. *City of*

Norwich, 93 F.R.D. 338, 345 n.2 (D. Conn. 1981). In its response to defendant's request for trial, plaintiff stated that it had not completed discovery, and that it would "promptly file a discovery motion." Plaintiff, however, chose not to move to compel discovery, nor did it challenge the denial of the FOIA request. Since plaintiff had ample time and opportunity before trial to develop its case, its request for post-trial discovery is denied.

Under the Tariff Act of 1930, export value is the preferred statutory basis for valuation of imported merchandise. 19 U.S.C. § 1401a(a)(1)–(4); *see, e.g., Magnesium Elektron Inc.* v. *United States,* 64 Cust. Ct. 728, 735, R.D. 11709 (1970). Moreover, it is well-established that in order to prove United States value plaintiff must first negate the existence of an export value for such or similar merchandise. *See Boyle & Co.* v. *United States,* 2 CIT 222, 225 (1981); *Glenside Steel Co.* v. *United States,* 71 Cust. Ct. 23, 32, C.D. 4466, 364 F. Supp. 1398 (1973), *aff'd,* 62 CCPA 1, C.A.D. 1133, 503 F.2d 563 (1978).

From the record, it appears that plaintiff's chief argument in attacking export value as the proper basis for valuation is that the merchandise could not be purchased directly from Rolex or its exclusive distributors, and, therefore, was not sold or offered for sale in the usual wholesale quantities. The cases, however, hold that, in certain instances, sales by wholesalers outside of the manufacturer's normal channels of distribution may be appropriate to determine the proper basis of value. *See, e.g., Maher-App & Co.* v. *United States,* 64 Cust. Ct. 598, 605–06, R.D. 11690 (1970); *Glanson Co.* v. *United States,* 31 Cust. Ct. 473, 475, A.R.D. 33 (1953); *see also United States* v. *H.W. Robinson & Co.,* 19 CCPA 274, 276, T.D. 45436 (1932). Thus, it is clear that merchandise may be offered for sale in the usual wholesale quantities by sellers other than the manufacturer or exclusive distributor of the manufacturer.

Plaintiff in this case argues that its purchases of the Rolex watches were retail purchases, and that the merchandise was not freely sold or offered for sale in the usual wholesale quantities. This argument, however, is without merit. Although plaintiff's witness sought to establish that the purchases were retail purchases, his testimony, on direct and cross-examination, shows clearly that the purchases by Bailey & Wasson were wholesale purchases. The record leaves no doubt that Bailey & Wasson purchased wholesale quantities of the watches, and, in turn, sold them to retail jewelers. The record also shows that plaintiff admitted that Bucherer's sales to Bailey & Wasson were sales "at the wholesale level." At trial, although plaintiff was given the opportunity, it was not able to refute this admission. Plaintiff's witness also stated that Bailey & Wasson was a "substantial importer" of watches from Hong Kong. Therefore, the Court finds that plaintiff purchased the imported watches in the usual wholesale quantities for exportation to the United States.

Although plaintiff is dissatisfied with the basis of appraisement of its merchandise, it has not introduced any evidence that would show that the merchandise was improperly appraised by the Customs Service. The record shows that the Rolex watches were purchased in the usual wholesale quantities for exportation to the United States, and that Bailey & Wasson resold the watches to retail jewelers. Therefore, it is the determination of the Court that plaintiff has not rebutted the presumption of correctness that attaches to the government's determination. Accordingly, the appraised values are affirmed, and the action is dismissed.

(Slip Op. 86–13)

NATIONAL JUICE PRODUCTS ASSOCIATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANT

Court No. 85–11–01611

OPINION

(Decided January 30, 1986)

[Defendant's motion to dismiss denied. Plaintiffs' motion for preliminary injunction denied. Plaintiffs' motion for declaratory relief granted in part.]

Collier, Shannon, Rill & Scott (Lauren R. Howard, Paul C. Rosenthal, Michael R. Kershow), for plaintiffs.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, *Barbara M. Epstein*, Civil Division, United States Department of Justice, for defendants.

RESTANI, *Judge:* This case involves a United States Customs Service (Customs) ruling that country-of-origin marking requirements apply to frozen concentrated orange juice and reconstituted orange juice that contain imported concentrated orange juice for manufacturing. 19 U.S.C. § 1304 (1982 & West Supp. 1985) (country-of-origin marking requirements); C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21 (Sept. 4, 1985) (Ruling No. 728557). This ruling is being challenged by plaintiffs, the National Juice Products Association (NJPA) [1] and

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[1] The following is a list of the National Juice Products Association members of 1985–86:
Alcoma Packing Company*
Allsun Pure Juice Corporation
American Agronomics Corporation*
B.C. Cook & Sons Enterprises
Ben Hill Griffin Citrus Company
Berry Citrus Products, Inc.*
Biscaglia Brothers Wine Company
Bordo Citrus Products Cooperative
Butland Industries, Inc.
California Citrus Producers, Inc.
Cargill Citro-America, Inc.
Caulkins Indiantown Citrus Company*
Citram, Inc.
Citrus Belle
Citrus Central, Inc.
Citrus Products, Inc.
Citrus Service, Inc.
Citrus World, Inc.
Clermont Fruit Packers, Inc.
Coca-Cola Foods

Continued

Citrus World, Inc., Coca-Cola Foods, a Division of the Coca-Cola Company, Lykes Pasco Packing Company, and TreeSweet Products, individually and as members of NJPA. Two motions are currently before the court. Plaintiffs have moved for a preliminary injunction to delay the implementation of Customs' ruling, or, in the alternative, for declaratory relief. Defendants have moved for dismissal of the case for lack of jurisdiction, and in the alternative, for judgment on the administrative record.

The controversy underlying this action began on January 16, 1985, when Customs national import specialist, Officer W.J. Springer of the New York Seaport, sent a directive to various Customs ports advising them of his opinion that orange juice products using the imported ingredient of concentrated orange juice for manufacturing (manufacturing concentrate) be marked to indicate foreign

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CTC North America
Cumberland Farms Dairy, Inc.
Delano Growers Grape Products
Dell Products Corporation
Del Monte Corporation
Dole Processed Food Company
Farmland Dairies, Inc.
Flavor Fresh Foods Corporation
Flavors From Florida*
Golden Gem Growers, Inc.
Grande Citrus Corporation
Great Northern Juice Company
Guild Wineries & Distilleries
Holiday Juice, Ltd.
Holly Hill Fruit Products Company, Inc.
Home Juice Company
H.P. Hood, Inc.
Imperial Flavors, Inc.
JB Food Industries, Inc.
Johanna Farms, Inc.
Juice Bowl, Inc.
Juice Farms Incorporated
Juice Services, Inc.
Knudsen Corporation
Kraft, Inc.
Libby, McNeill & Libby
Lincoln Foods, Inc.
Ludford Fruit Products, Inc.
Lykes Pasco Packing Company
MCP Foods, Inc.
New England Apple Products Company
Ohio Pure Foods, Inc.
Orange Company of Florida*
Paramount Citrus, Inc.
Paris Food Corporation
Parman-Kendall Corporation
Peninsular Products Company
Pepsico, Inc.
Red Creek
Riverbend Products, Inc.
Seven-Up Foods, Citrus Division
Silver Springs Citrus Cooperative
Southern Fruit Distributors, Inc.
Succocitrico Cutrale, S.A.
Sunbase USA, Inc.
Sunkist Growers, Inc.
Sun Pac Foods, Inc.
Sun Rype Products, Ltd.
Texas Citrus Exchange
The Kroger Company
The Southland Corporation
Thomas J. Lipton, Inc.
TreeSweet Products Company
Tropicana Products, Inc.
Vie-Del Company
Vita-Pakt Citrus Products Company
Volvic (France)
Washington State Juice
Zumos Argentinos, S.A.

* These members of the NJPA are not participating in this suit.

origin. Officer Springer's opinion was based on a recent Customs determination that found country-of-origin marking requirements applicable to processed honey. C.S.D. 84–112, 18 Cust. Bull. 1106 (July 2, 1984). In his directive, Officer Springer advised Customs officers at the various ports to notify importers of manufacturing concentrate of this contemplated change in policy.

On April 22, 1985, plaintiffs requested that Customs issue a binding ruling, pursuant to 19 C.F.R. § 177.2 (1985), as to the applicability of the country-of-origin marking requirements of 19 U.S.C. § 1304 to frozen concentrated orange juice and reconstituted orange juice that contain imported manufacturing concentrate. On September 4, 1985, Customs issued a ruling in response to plaintiffs' April 22 request. C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21. Customs held that imported manufacturing concentrate is not substantially transformed in the process that converts the manufacturing concentrate into frozen concentrated orange juice or reconstituted orange juice. Consequently, Customs held that the country-of-origin certification requirements of 19 C.F.R. § 134.25 (1985) apply to final repacked orange juice products that contain any foreign manufacturing concentrate entered for consumption or withdrawn from warehouse on or after January 1, 1986. Specifically, the importer must certify to Customs either that the retail package will be properly marked with the country of origin or that the importer will notify the repacker of the marking requirements. All retail packages of orange juice subject to the ruling must be marked with either the country of origin of the manufacturing concentrate or the phrase "This product contains foreign concentrate from ————————." If the product contains concentrate from more than one foreign country, the package must list all such countries. *Id.* at 28. Customs also noted that this decision overruled a 1979 ruling, C.S.D. 80–88, 14 Cust. Bull. 865 (Aug. 17, 1979) (Ruling No. 710823), which held that the reconstitution of orange juice is a substantial transformation of the frozen concentrate. C.S.D. 85–47, 19 Cust. Bull. No. 39 at 28.

In a letter dated October 21, 1985, the NJPA requested that Customs postpone the implementation date of the September 4 ruling until January 1, 1987. The NJPA based this request on the need of the domestic orange juice industry for additional time to secure packaging in compliance with Customs' ruling and to reduce existing packaging inventory. A similar request was made by the Florida Citrus Commission and the State of Florida Department of Citrus in a letter dated October 25, 1985. Customs subsequently extended the effective date of the marking ruling from January 1 to March 1, 1986. 19 Cust. Bull. No. 50 at 15 (Dec. 11, 1985).

Plaintiffs have moved for pre-importation review of the September 4 rulings, claiming that this court has jurisdiction over the matter pursuant to 28 U.S.C. § 1581(i)(4) (1982) or, in the alterna-

tive, 28 U.S.C. § 1581(h) (1982).[2] Defendant contends that the court lacks jurisdiction under either of those provisions.

Defendant argues that this case has been brought prematurely and should only be reviewable following protest proceedings under 19 U.S.C. §§ 1514 and 1515 (1982 & West Supp. 1985); *see* 28 U.S.C. § 1581(a) (1982) (Court of International Trade jurisdiction following protest and denial). The customary and generally preferred avenue of review is the traditional protest route. In this case, however, currently plaintiffs cannot pursue section 1581(a) review. C.S.D. 85-47 will not be in effect until March 1, 1986. Therefore, plaintiffs cannot import a shipment to test the ruling at this time. In addition, under certain circumstances a plaintiff need not complete the protest procedure before bringing a civil action. One of those circumstances is when the action falls within the jurisdiction of section 1581(h).[3]

The Court of Appeals for the Federal Circuit has defined the requirements for invoking this court's declaratory judgment jurisdiction: [4]

> (1) judicial review must be sought prior to importation to goods;
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> (2) review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such ruling;
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> (3) the ruling must relate to certain subject matter; and
>
> (4) it must be shown that irreparable harm will occur unless judicial review is obtained prior to importation.

American Air Parcel Forwarding Co. v. *United States*, 718 F.2d 1546, 1551-52 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1909 (1984) (cited in *718 Fifth Avenue Corp.* v. *United States*, 7 CIT ——, Slip Op. 84-39 at 3-4 (April 13, 1984)). Since defendant challenges jurisdiction under section 1581(h), plaintiffs have the burden of demonstrating that jurisdiction exists. *718 Fifth Avenue* at 3; *Lowa, Ltd.*

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[2] As a preliminary matter, the court observes that § 1581(i) is the residual jurisdiction of this court. *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 182-83, 687 F.2d 467, 471-72 (1982); *Ass'n of Food Indus., Inc.* v. *von Raab*, 9 CIT ——, Slip Op. 85-128 at 4 (Dec. 17, 1985); *Vivitar Corp.* v. *United States*, 7 CIT ——, 585 F. Supp. 1419, 1424-25 (1984), *aff'd*, 761 F.2d 1552, 1559 (1985). As such, it may only be invoked when other available avenues of jurisdiction are "manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Manufacture de Machines du Haut-Rhin* v. *von Raab*, 6 CIT ——, 569 F. Supp. 877, 882-83 (1983). *Accord American Ass'n of Exporters and Importers—Textile and Apparel Group* v. *United States*, 751 F.2d 1239, 1246 (Fed. Cir. 1985); *Uniroyal*, 69 CCPA at 187, 687 F.2d at 475 (Nies, J., concurring); *United States Cane Sugar Refiners' Ass'n* v. *Block*, 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982); *Vivitar*, 7 CIT at ——, 585 F. Supp. at 1425. Consequently, the two bases of jurisdiction asserted by plaintiffs must be addressed in reverse order from the priorities given them by plaintiffs. Section 1581(i) will only be a basis of jurisdiction if § 1581(h) is manifestly inadequate or otherwise entirely inappropriate.

[3] The legislative history of § 1581(h) outlines its relationship to § 1581(a):

> It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met.

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, 47, *reprinted in* 1980 U.S. Code Cong., & Ad. News 3729, 3758.

[4] 28 U.S.C. § 1581(h) (1982) reads in relevant part:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury . . . relating to * * * marking * * *, but only if the party commencing the action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

v. *United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984); *United States* v. *Biehl & Co., 3* CIT 158, 160, 539 F. Supp. 1218, 1220 (1982).

Defendant contends that plaintiffs fail to meet two of the requirements for section 1581(h) review. First, defendant contends that C.S.D. 85–47 is not the type of ruling that can be reviewed under section 1581(h). Second, defendant argues that plaintiffs have failed to demonstrate that they will be irreparably harmed if they cannot secure section 1581(h) review.

The essence of defendant's argument regarding the type of ruling appropriate for section 1581(h) review is that C.S.D. 85–47 is insufficiently specific to be the subject of pre-importation review. The legislative history defines "ruling" as "a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, 47, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3758. This court has interpreted "the legislative history as speaking to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact with virtual certainty." *Pagoda Trading Co.* v. *United States*, 6 CIT ——, 577 F. Supp. 22, 24 (1983). Neither of the two cases cited by defendant in which jurisdiction was denied because the action involved an inappropriate ruling apply in this case. In *Pagoda Trading* the ruling involved was a "general interpretive ruling" that contained "guidelines 'set forth as an aid to Customs officers in classifying specific footwear constructed with foxing.' " *Pagoda Trading*, 6 CIT at ——, 577 F. Supp. at 23 (quoting 48 Fed. Reg. 22,910 (1983)). Likewise, in *American Air Parcel Forwarding Co.* v. *United States*, section 1581(h) could not be invoked because the ruling involved was an "internal advice" ruling. 5 CIT 8, 11, 557 F. Supp. 605, 608, *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983).[5] Although not restricted to the facts of a single case, the ruling at issue is clearly distinguishable from internal advice and general interpretive rulings. *See Association of Food Industries, Inc. (Pistachio Group)* v. *von Raab*, 9 CIT ——, Slip Op. 85–128 at 3 (Dec. 17, 1985) (with regard to country-of-origin ruling pertaining to all imports of pistachio nuts, the court found the ruling "sufficiently related to a specific import transaction to obtain jurisidiction under [section 1581(h)]"). Customs based its ruling here on retail organge juice products that contain either 30 or 50 percent foreign manufacturing concentrate, and which have added ingredients for flavoring purposes. Plaintiffs represented these percentages of foreign concentrate to be standard in the industry, and plaintiffs clearly intend to produce products containing these percentages of foreign concentrate from the imported concen-

[5] In so finding, the *American Air Parcel* court relied on legislative history that expressly dealt with the subject. "In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review,' both of which relate to completed import transactions." *American Air Parcel* at 608, quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3758.

trate referred to in the ruling. As to such products, plaintiffs will feel the impact of this ruling "with virtual certainty." Thus, although the ruling has interpretive aspects, it is adjudicative as to the products described and is sufficiently specific to be reviewed under section 1581(h).

In this case, plaintiffs' written request sought a binding ruling pursuant to 19 C.F.R. § 177.2 (1985) of the country-of-origin marking requirements to frozen concentrated orange juice and reconstituted orange juice that contain imported manufacturing concentrate. Defendant argues that the form of the ruling at issue was not that which was contemplated by section 1581(h). In response to plaintiffs' request, however, Customs issued a ruling that it considered final.[6] The court sees no reason to distinguish among various types of final, specific rulings in determining whether pre-importation review is proper. Thus, section 1581(h) review may be had of a ruling such as C.S.D. 85-47, provided the other requirements of section 1581(h) review are met.

The second requirement under dispute is whether plaintiffs will be irreparably harmed if they are unable to secure pre-importation review. The essence of "irreparable injury" is that it is harm that "cannot receive reasonable redress in a court of law." *Manufacture de Machines du Haut Rhin* v. *von Raab,* 6 CIT ——, 569 F. Supp. 877, 881-82 (1983) (quoting *Black's Law Dictionary* 706-07 (5th ed. 1979)). In making this determination, what is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief. *National Corn Growers Association* v. *Baker,* 9 CIT ——, Slip Op. 85-119 at 27 (Nov. 26, 1985) ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm.") (quoting *Sampson* v. *Murray,* 415 U.S. 61, 90 (1975), quoting *Virginia Petroleum Jobbers Association* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)); *Hault-Rhin,* 6 CIT at ——, 569 F. Supp. at 381 (irreparable injury includes an injury "whether great or small"); *S.J. Stiles Associates* v. *Snyder,* 68 CCPA 27, 30, 646 F.2d 522, 525 (1981) (to demonstrate irreparable harm "[a] presently existing, actual threat must be shown"); *State of New York* v. *Nuclear Regulatory Commission,* 550 F.2d 745, 755 (2d Cir. 1977) (alleged threats of irreparable harm cannot be remote or speculative but must be actual and imminent). Plaintiffs have asserted several grounds in support of their claim of irreparable harm. These grounds must be analyzed to determine both their legal sufficien-

[6] On August 16, 1985, prior to the issuance of Customs' ruling, NJPA sent a letter to then-Assistant Secretary of the Treasury, John Walker, requesting that the Treasury Department review any ruling issued by Customs in response to the ruling request prior to the time that such ruling was finalized. A response, written by Commissioner of Customs William von Raab, stated:

> In view of the various competing interests in this case and the significant policy questions raised, this matter was under review at the highest levels of Customs before a final decision was reached. We do not believe that additional review by the Department is warranted.

This letter was dated September 11, 1985, a week after the issuance of Customs' decision. Thus, although plaintiffs requested a ruling from the Secretary of the Treasury, defendant declined to issue one. Refusal to issue a ruling is a basis for § 1581(h) jurisdiction.

cy [7] and whether plaintiffs have offered sufficient documentation to support the claims. *718 Fifth Avenue Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-39 at 7 (Apr. 13, 1984) ("documentation is essential to establishing irreparable harm"); *Tropicana Products, Inc.* v. *United States,* 3 CIT 171, 174-76, *modified,* 3 CIT 240 (1982) (bare allegations, not supported by facts and figures, are insufficient).

Plaintiffs offer the following reasons to support their claim that they will suffer irreparable harm if they are unable to secure pre-importation review. First, plaintiffs maintain that their packaging suppliers will be unable to provide the necessary labels and cans by the current effective date of March 1, 1986, and that the unavailability of such packaging will result in the inability to fill orders placed by retail customers. In support of this proposition, plaintiffs offer affidavits of three packaging campany representatives. These affiants estimate that the transition to packaging complying with the new ruling would take a year to two and one-half years.

As plaintiffs have noted, under the country-of-origin marking statute, Customs is required to withhold delivery of imported merchandise until it is properly marked or until proper certifications are filed. 19 U.S.C. § 1304(g) (1982 & West Supp. 1985). Therefore, to the extent that plaintiffs cannot comply with Customs' ruling by March 1, 1986, they will be unable to use foreign manufacturing concentrate and will not be able to satisfy all of their customer's orders for retail orange juice products. This court has recognized that severe disruption of business operations can constitute irreparable injury under certain circumstances. *718 Fifth Avenue Corp.,* Slip Op. 84-39 at 7 ("Business disruption resulting from administrative delay could be sufficient to demonstrate irreparable harm.") (citing *American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 300, 515F. Supp. 47, 54 (1981)); *Lois Jeans & Jackets, U.S.A., Inc.* v. *United States,* 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (potential costs required for altering plaintiff's production methods in the event that plaintiff was compelled to comply with Customs' ruling as a factor demonstrating irreparable harm). Plaintiffs have provided undisputed documentation of the possibility of significant disruption of their business operations that will result if they are required to comply with the ruling.

Plaintiffs' second argument is that they will be forced to discard millions of dollars worth of noncomplying labels that are currently in inventory. Plaintiffs have provided documentation that demonstrates that if they are unable to secure pre-importation review they will be required to either warehouse this inventory or destroy the labels. Either way, plaintiffs will be required to expend funds that will not be recoverable should they ultimately prevail on the

[7] A substantial number of the cases dealing with irreparable harm ahve involved preliminary injunctive relief. This court has stated, however, that "[t]he standard for proving irreparable harm [in the declaratory judgment context[is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." *718 Fifth Avenue Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-39 at 4 n.3 (Apr. 13, 1984).

merits. This factor also applies to plaintiffs' third argument that they will be forced to spend millions of dollars to redesign packaging to comply with Customs' ruling. Plaintiffs support this argument with affidavits from a sampling of processors, whose estimates of their costs for new labels and packaging, even under normal conditions, proved to be substantial. These costs, also, could not be recouped if the court were to rule in plaintiffs' favor.[8]

The final consideration is whether there exists a viable temporary measure for providing the country-of-origin information without forcing plaintiffs to incur these nonrecoupable costs. The availability of such alternatives can reduce the impact of the change in the labeling and substantially mitigate the damage. *Association of Food Industries, Inc. (Pistachio Group)* v. *von Raab,* 9 CIT ——, Slip Op. 85–128 (Dec. 17, 1985). In the pistachio case, this court held that the plaintiffs failed to demonstrate that they would suffer irreparable injury if unable to secure pre-importaton review. In doing so, the court stated that it was not "persuaded that the use of adhesive labels to add the country of origin is an unacceptable or impractical interim measure. This method would allow the use of current label inventories until they are depleted." *Id.* at 5. In the present case, none of the temporary measures suggested by defendant is a feasible alternative. The first alternative, the use of adhesive stickers, although a possible solution in the pistachio case, is not a feasible alternative in this case. In the summer of 1985, Citrus World attempted to apply foreign language stickers to frozen concentrated orange juice cans. These attempts were unsuccessful because the cans are sprayed with water to wash off excess juice and the stickers will not stick to a wet surface. Similarly, Coca-Cola Foods tried to place stickers with a special cash prize offer onto their reconstituted orange juice containers. These containers, too, had wet surfaces and the stickers would not adhere to them. The evidence also shows that even if the stickers would adhere to the containers there is no guarantee of accurate placement of the stickers on the containers. The random placement of the stickers, which are blown from machines, could obscure existing text. Some of this information, such as product identity, net weight, and distributor's address, is required by the Fair Packaging & Labelling Act, 21 U.S.C. § 343 (e), (f) (1982) and the Food, Drug & Cosmetic Act, 15 U.S.C. § 1453(a) (1982). Other information has im-

[8] Plaintiffs also contend that to the extent that they mark their retail packages with a designation of origin, they will be commercially disadvantaged by loss of consumer acceptance of these products. Injuries to reputation have been recognized as irreparable and not readily recompensed in the trademark context. *Coca-Cola Co.* v. *Gemini Rising, Inc.,* 346 F. Suppl 1183, 1189 (E.D.N.Y. 1972); *Cutler-Hammer, Inc.* v. *Universal Relay Corp.,* 285 F. Supp. 636, 639 (S.D.N.Y. 1968). In these cases, however, the professed injuries would be the result of either a play on words or mislabeling. In this case, the labeling would be accurate, although potentially neither desirable nor required by law. Furthermore, the evidence offered by plaintiffs on this point is not conclusive. The survey conducted by Fine, Travis & Associates on Florida's Seal of Approval found that in general consumers reacted negatively to suggestions that orange juice ingredients are imported. However, the survey sample consisted of only 30 consumers and a caveat in the report cautions that the findings "are not necessarily replicable nor do they indicate how widespread a particular response may be." This factor, then, cannot be used to support a claim of irreparable harm under these circumstances.

portant commercial significance, such as brand name and the universal product coding, which enables scanners to "read" the price. Additionally, Customs regulations require that the marking statement be in close proximity to the United States address. 19 C.F.R. § 134.22(c) (1985). In any case, even if adhesive stickers were physically possible to apply, plaintifffs could not recoup the significant costs of acquiring the equipment and stickers.

Another alternative suggested by defendant is to lithograph the country-of-origin marking on the "ends" of the cans. This solution is also unsatisfactory. Orange juice is packaged in a variety of containers, many of which are not cans and do not have "ends" to be lithographed. Additionally, plaintiffs' exhibits demonstrate that marking of the container ends may not satisfy Customs' requirement, noted above, that the country-of-origin statement be "in close proximity" to the United States address. 19 C.F.R. § 134.22(c) (1985). The distributor's clause is generally located on the label that encircles the can, not on its end.

Defendant also suggests that plaintiffs can stockpile manufacturing concentrate imported before March 1, 1986, so that the orange juice processors can avoid the requirements of the marking ruling until their inventory is depleted and new labels can be made. Plaintiffs counter with evidence indicating that such stockpiling could be more costly to the industry than revising its labels. Undisputed evidence indicates that in the past year the price of imported manufacturing concentrate has dropped sharply and that this trend is expected to continue in the upcoming months. Affiant Steven R. Michael, representative of Ohio Pure Foods, stated that the price of foreign manufacturing concentrate dropped by thirty percent since January 1985. If U.S. processors stockpiled large quantities of imported manufacturing concentrate and the price of the commodity continued to decline, plaintiffs would suffer a substantial financial loss.[9] Another problem with the stockpiling solution is the need for storage space to hold the concentrate. Many of the processors do not have sufficient space on their premises to permit long-term storage of large quantities of manufacturing concentrate. Although plaintiffs did not provide facts or figures as to the potential cost of such storage, it is reasonable to assume that such cost would be significant.

The final suggestion offered by defendant is that the U.S. orange juice processing industry could rely exclusively on the supply of domestic manufacturing concentrate to avoid the requirements of the marking ruling. The evidence indicates that this, too, is not a realistic alternative. In four out of the last five seasons, severe freezes have substantially diminished the availability of U.S. oranges and

[9] Lykes Pasco Packing Company illustrated this point by calculating the impact of the stockpiling suggestion had it been implemented for eight months during 1985. If Lykes Pasco purchased the concentrate directly from Brazil, it would have lost $3.5 million. If the concentrate had been purchased on the futures market, the company would have lost $6.5 million. Affidavit of Talmage G. Rice.

their by-products, including manufacturing concentrate. In his affidavit, Dan L. Gunther, director of economic research for the Florida Department of Citrus, anticipates that, as in past seasons, "U.S. orange juice demand [for this season] is expected to exceed domestic orange juice production." He also notes the necessity of mixing early-season domestic juice with late-season imported juice, because of the differences in seasons between the northern and southern hemisphere, to ensure product consistency. Given these factors, Mr. Gunther concludes that domestic processors "will not be able to use domestic manufacturing concentrate to meet total market needs during the season or even the market needs in the early part of the season." Affidavit of Dan L. Gunther. Defendant offers no evidence to refute this conclusion.

In sum, plaintiffs have demonstrated by clear and convincing evidence [10] that they will suffer irreparable injury if they cannot procure pre-importation review. The cumulative impact of the factors stated by plaintiff, specifically, the business disruption likely to occur because of the inability of the industry packagers to satisfy the simultaneous demand for new labels, the cost of discarding or storing noncomplying labels, and the cost of redesigning packaging, would be substantial and none of these expenses could be recouped should plaintiffs ultimately prevail on the merits. The impact of these injuries would not be alleviated by any of the alternatives suggested by defendants. This showing of irreparable harm allows the court to exercise jurisdiction under section 1581(h) and to provide, if appropriate, declaratory relief.

Because the court finds that the declaratory relief awarded under section 1581(h) is adequate in this case to address any harm to plaintiff, jurisdiction may not be invoked under section 1581(i). *See supra* note 2 and discussion, *infra*. Furthermore, injunctive relief may not be granted under section 1581(h).[11] Therefore, plaintiff's motion for injunctive relief is denied.

Having established that the court has jurisdiction to review the merits of the case, the court turns to the facts at hand. A full appreciation of the controversy at bar requires an understanding of the two-step process that transforms oranges into the final retail products. The retail products involved in this case are reconstituted orange juice [12] and frozen concentrated orange juice.

The first level of production involves reducing fresh oranges to manufacturing concentrate. The oranges are tested for solid content and then run through an extractor and transferred to an evaporator, where the juice is reduced to approximately fourteen percent of its original volume and cooled. During this process, the es-

[10] 28 U.S.C. § 2639(b) (1982) states: "In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence."

[11] 28 U.S.C. § 2643(c)(4) (1982) provides: "In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief."

[12] This product, orange juice in liquid form, is also called orange juice from concentrate.

sential oils and flavoring ingredients present in the juice also evaporate. The end result is a viscous substance with a brix level of approximately 65°.[13] Because the oils and flavoring ingredients are lost during this process, manufacturing concentrate lacks the characteristic flavor of oranges.

The second level of production involves blending this manufacturing concentrate with other ingredients (primarily water) to create an end product of either frozen concentrated orange juice or reconstituted orange juice. This process generally involves mixing the manufacturing concentrate with purified and dechlorinated water, orange essences, orange oil, and, in some cases, fresh juice. Once blended, the product is subjected to a variety of quality control and production tests. At this point, the frozen concentrated orange juice has a brix level of about 41.8°. It is then packaged in cans and frozen. Reconstituted orange juice has a brix level of 11.8°. It is pasteurized, retested, chilled, and packed in liquid form.

Section 304 of the Tariff Act of 1930, as amended, generally requires that every article of foreign origin that is imported into the United States be marked with its country of origin in such a manner that its ultimate purchaser will be aware of its country of origin. An ultimate purchaser is defined in Customs regulations as "the last person in the United States who will receive the article in the form in which it was imported." 19 C.F.R. § 134.1 (1985). Where a foreign article is subjected to manufacturing in the United States before reaching the consumer, the regulations provide some guidance as to when the manufacturer will be regarded as the ultimate purchaser. A manufacturer will be considered the ultimate purchaser "*if he subjects the imported article to a process which results in a substantial transformation of the article,* even though the process may not result in a new or different article." 19 C.F.R. § 134.1(d)(1) (1985) (emphasis added). On the other hand, if the manufacturing process is "merely a minor one which leaves the identity of the imported article intact," the consumer is regarded as the ultimate purchaser. *Id.* at § 134.1(d)(2). In the former case the product is not subject to the country of origin marking statutes; in the latter the country of origin must appear on the product.

The critical question in this case is whether the foreign manufacturing concentrate undergoes a "substantial transformation" in becoming frozen concentrated organce juice and reconstituted organge juice. Customs has recently promulgated 19 C.F.R. § 134.35 (1985), which defines "Articles substantially changed by manufacture" as follows:

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle

[13] Degree brix is a measurement of the percentage of the soluble solids (sugar) in a concentrate, as measured in air at 20° centigrade and adjusted for the acid correction of the solids. Thus, manufacturing concentrate with a brix value of 65° contains 65 pounds of fruit sugar solids in every 100 pounds of solution.

of the decision in the case of *United States* v. *Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. The outermost containers of the imported articles shall be marked in accord with this part.[14]

The Customs' ruling at issue involved manfacturing concentrate processed from oranges grown in foreign countries. This manufacturing concentrate is then blended with domestic concentrate. Ratios of 50/50 or 30/70 (foreign/domestic) were represented to be "common." Customs ruled that for purposes of country of origin marking, the manufacturing concentrate is not "substantially transformed" after undergoing the further processing in the United States. Under Customs' ruling, retail packages of frozen concentrated orange juice and reconstituted orange juice must be marked to indicate that the products contain foreign concentrate.

This "name, character, or use" test was applied by Customs in finding that no substantial transformation occurs in the production of retail orange juice products from manufacturing concentrate. Customs' ruling must stand unless it is shown to be arbitrary, capricious or otherwise not in accordance with the law. 28 U.S.C. § 2640(d) (1982); 5 U.S.C. § 706(a)(2)(A) (1982).

In its ruling, Customs addressed each of the factors, name, character, and use, in turn. Plaintiffs argued that the name change

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[14] In *Gibson-Thomsen*, the court indicated that substantial transformation occurs when an article acquires a "new name, character, *and* use." *Gibson-Thomsen*, 27 CCPA at 273 (emphasis added). This restrictive test was modified to require a "new name, character, *or* use." *Midwood Indus., Inc.* v. *United States*, 64 Cust. Ct. 439, 506, 313 F. Supp. 951, 959 (emphasis added), *appeal dismissed*, 57 CCPA 141 (1970). As modified, the test is similar to the tests for whether an article is a "manufacture or product" of a given country for drawback purposes and whether an article has been "[s]ubstantially transformed in [a] beneficiary developing country into a new and different article of commerce" for duty free treatment under the Generalized System of Preference (GSP). 19 C.F.R. § 10.177(a)(2) (1985). The drawback test states that for a manufacture to occur "[t]here must be a transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" *Anheuser-Busch Brewing Ass'n* v. *United States*, 207 U.S. 556, 562 (1908) (cited in *United States* v. *Patel*, 762 F.2d 784, 792 (9th Cir. 1985), quoted in *Belcrest Linens* v. *United States*, 741 F.2d 1368, 1371 (Fed. Cir. 1984)). *Accord, United States* v. *International Paint Co.*, 35 CCPA 87, 93, C.A.D. 376 (1948); *Ishimitsu* v. *United States*, 11 Ct. Cust. App. 186, 191, T.D. 38,963 (1921). Likewise, for a substantial transformation to occur for GSP purposes, an article must "emerge from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *Torrington Co.* v. *United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985) (citing *Texas Instruments* v. *United States*, 681 F.2d 778, 782 (CCPA 1982)). The policies underlying the different statutes are similar but not identical. The GSP statute "represents the United States' participation in a multinational effort to encourage industrialization in lesser developed countries through international trade." *Torrington Co.*, 764 F.2d at 1565. Whereas "[t]he theory underlying the granting of drawback * * * is and always has been that it would encourage the development in the United States of the making of articles for export, thus increasing our foreign commerce and aiding domestic industry and labor." *International Paint*, 35 CCPA at 90. In contrast, the primary purpose of the country-of-origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." (Congress, of course, had in mind a consumer preference for American made goods.) *United States* v. *Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940) (quoted in *Globemaster, Inc.* v. *United States*, 68 Cust. Ct. 77, 79–80, 340 F. Supp. 975–76 (1972)). *Accord, United States* v. *American Sponge & Chamois Co.*, 16 Ct. Cust. App. 61, 65, T.D. 42,731 (1928) (quoting *Hobe Button Co.* v. *United States*, 12 Ct. Cust. App. 341, 344, T.D. 40,488 (1924)). Unlike the GSP and drawback statutes, the encouragement of the advancement of the industry of particular countries is one reason underlying the country-of-origin marking statute, not the only purpose. *American Sponge*, 16 Ct. Cust. App. at 65, *Hobe Button*, 12 Ct. Cust. App. at 344. Thus, although the language of the tests applied under the three statutes is similar, the results may differ where differences in statutory language and purpose are pertinent.

from "concentrated orange juice for manufacturing" to "frozen concentated orange juice" and "orange juice from concentrate" was significant to a finding of substantial transformation. The court agrees with Customs' conclusion that these names, derived from the FDA's standards of identity, "merely refer to the same product, orange juice, at different stages of production.[15] In any case, a change in the name of the product is the weakest evidence of a substantial transformation. *See Uniroyal, Inc.* v. *United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983) (fact that this imported product was called an "upper" and final product called a "shoe" did not affect the court's finding of no substantial transformation), *United States* v. *International Paint Co.*, 35 CCPA 87, 93-94, C.A.D. 376 (1948) ("Under some circumstances a change in name would be wholly unimportant and equally so is a lack of change in name under circumstances such as [in this drawback case].").

Customs also found that the fact that the imported concentrate is sold to producers whereas the retail product is sold to consumers does not constitute a sufficient change in character and use to render the concentrate substantially transformed. Plaintiffs rely on the *Midwood* decision, in which this court's predecessor, the Customs Court, emphasized this transition from producers' goods to consumers' goods in finding that steel forgings are substantially transformed into flanges and fittings. *Midwood Industries, Inc.* v. *United States*, 64 Cust. Ct. 499, 507, 313 F. Supp. 951, 957, *appeal dismissed*, 57 CCPA 141 (1970). As noted by Customs, however, the signficance of this producers' good-consumers' good transformation in marking cases is diminished in light of this court's recent decision in *Uniroyal, Inc.* v. *United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983). In *Uniroyal*, the imported article was a leather shoe upper to which an outsole was attached in the United States. Although the upper is not a consumers' good in that it cannot be worn as a shoe, the court found that there was no substantial transformation. *Id.* at 227, 542 F. Supp. at 1031. Under recent precedents, the transition from producers' to consumers' goods is not determinative. Plaintiffs must demonstrate that the processing done in the United States substantially in-

[15] Plaintiffs make much of the fact that the imported and retail products at issue in this case have distinct standards of identity under Food and Drug Administration (FDA) regulations. Specifically, plaintiffs point out that the imported product is called "concentrated orange juice for manufacturing" and the retail products are known and labeled as "frozen concentrated orange juice" and "orange juice from concentrate." 21 C.F.R. §§ 146.145, 146.146, 146.153 (1985). This argument is not persuasive. First, Customs regulations and FDA regulations are promulgated under completely different statutes and hence one cannot be considered binding on the other. Second, the policies underlying the regulations are quite different and the interests of one would not be furthered by relying on the other. Specifically, the policy underlying the FDA standards of identity have been described by plaintiffs as chiefly designed to inform the consumer about ingredients in a product. Merrill & Collier, *"Like Mother Used to Make": An Analysis of FDA Food Standards of Identity*, 74 Colum. L. Rev. 561, 563 (1974). To policy underlying the country-of-origin marking statute, however, as noted in note 14, *supra*, is to facilitate consumer purchasing decisions and to protect American industry. The FDA standards of identity are intended to aid in identifying the contents of a product, not in identifying the origin of the product as a whole. The FDA standards are not binding on Customs in a determination of whether a substantial transformation has occurred.

creases the value of the product or transforms the import so that it is no longer the essence of the final product. *United States* v. *Murray*, 621 F.2d 1163, 1170 (1st Cir. 1980) (Chinese glue blended with other glues in Holland were not substantially transformed because although it was transformed from a processors' good to an end-users' good there was no evidence that the glue had increased in value);[16] *Uniroyal*, 3 CIT at 224 and 222, 542 F. Supp. at 1030 and 1028 (imported upper was "the very essence of the completed shoe", court also found the attachment of uppers to outsoles "significally less costly" than the process of manufacturing the upper).

Plaintiffs in the instant case offer evidence that they claim demonstrates that domestic manufacturing substantially increases the value of the product from the manufacturing concentrate stage to the retail product stage. Contrary to plaintiffs' claim, however, the evidence offered indicates that the manufacturing concentrate constitutes the majority of the value of the end products. In fact, according to plaintiffs' evidence, the values added to the products involved here by the addition and blending of the orange essences, orange oil, and water, and related production range from 6.68 to 7.57%. This increase in value may be significant with regard to other products, but here the sum of all of the activities contributing to the added value are relatively minor, much like the addition of the outsoles in *Uniroyal*. In fact, plaintiffs' evidence shows that the addition of the oils and essences, the primary basis for plaintiffs' claim that substantial transformation has occurred, contributes only 1.75 to 1.86% to the value of the end products.[17]

Plaintiffs also contend that the value of the closing costs (for example, packaging) should be independently considered because of the alleged role of the closing activities in preserving the retail product. (The closing costs add 11.81 to 12.35% to the value of the final products.) Plaintiffs, however, cite no support for this proposition and the court does not find persuasive the argument that such costs are a factor in determining whether an article has undergone substantial transformation. *Cf. Ishimitsu* v. *United States*, 11 Ct. Cust. App. 186, T.D. 38,963 (1921).[18]

It is unclear whether plaintiffs contend that the addition of water constitutes a substantial change.[19] The court believes it does

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[16] In *Murray*, the First Circuit, in interpreting 19 C.F.R. § 134.1(b), held that

> the sub-term "substantial transformation" means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.

Murray, 621 F.2d at 1169.

[17] It is not clear whether the addition of fresh orange juice is essential to the production of any of the retail orange juice products involved in this case. In any case, plaintiffs claim an added value of approximately 1% for situations in which such juice is used. This minimal factor does not alter the result here.

[18] Plaintiff does not appear to argue that mere blending of foreign with domestic concentrate is a substantial transformation. Thus, the value of the domestic concentrate is not considered in this analysis.

[19] The court notes that in the Caribbean Basin Economic Recovery portion of the Caribbean Basin Initiative, Pub. L. 98-67, 96 Stat. 388 (1983), Congress has provided that a new and different article of commerce is not produced or manufactured in a beneficiary country by the "mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article." 19 U.S.C. § 2703(a)(2)(B) (1982 & Supp. 1983).

not, in and of itself, constitute such a change in the context of the products under discussion. The court, however, did consider the value added by the addition of water together with the oils, essences and the overall blending process. Considering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate and that the processing in the United States is a minor manufacturing process.

The court also finds reasonable Customs' conclusion that the manufacturing concentrate "imparts the essential character to the juice and makes it orange juice." C.S.D. 85–47, 19 Cust. Bull. No. 39 at 26. Thus, as in *Uniroyal*, the imported product is "the very essence" of the retail product. *Uniroyal*, 3 CIT at 224, 542 F. Supp. at 1030. The retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested, and processed oranges. The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product, it is still essentially the product of the juice of oranges. The court concludes that Customs' ruling that manufacturing juice concentrate is not substantially transformed when it is processed into retail orange juice products is not arbitrary or capricious, but is in accordance with applicable law.[20] The orange juice processors are not the ultimate purchasers of the imported product because consumers are the last purchasers to receive the product in essentially the form in which it is imported. In accordance with 19 U.S.C. § 1304, the retail packaging must bear an appropriate country-of-origin marking.

Having found that Customs' decision is not arbitrary and capricious and is thus substantively valid, the court must address the question of whether Customs was required to publish a notice in the Federal Register before publishing C.S.D. 85–47. Specifically, plaintiffs contend that such notice was required pursuant to Customs' regulation 19 C.F.R. § 177.10(c) (1985), which requires notice before publication of a ruling which has the effect of changing a practice or position of Customs.

The specific provision of this regulation that is the subject of dispute is section 177.10(c)(2).[21] As defendants have noted, section 177.10(c)(2) requires notice in the Federal Register if two conditions are met. First, the prospective ruling must have the effect of

[20] Plaintiffs also argue that Customs' ruling is arbitrary and capricious because in the ruling it stated that the certification requirements of the country of origin regulations will apply "[i]f the final repacked product of orange juice contains *any* foreign concentrate." C.S.D. 85–47, 19 Cust. Bull. No. 39 at 23 (emphasis added). Customs did not specifically refer to any blends besides those containing 30 and 50% foreign concentrate. In any case, the court considers the scope of the reviewable aspects of the ruling to be limited to retail orange juice products containing 30 or 50% foreign manufacturing concentrate. This decision does not address whether it would be appropriate to apply the country-of-origin marking statutes to products that contain any other percentages of imported manufacturing concentrate.

[21] 19 C.F.R. § 177.10(c)(2) (1985) reads, in pertinent part, as follows:

> Before the publication of a ruling which has the effect of changing a position of the Customs Service and which results in a restriction or prohibition, notice that the position (or prior ruling on which the position is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change.

changing a Customs Service position. Second, the change must *result* in a restriction or prohibition.

The first question, then, is whether C.S.D. 85–47 constitutes a change of position. Defendant maintains that Customs had never taken an official position regarding the specific circumstances of this case, and that consequently they were relieved from the notice requirements. This argument fails because an examination of Customs' prior rulings in orange juice related situations clearly establishes its position that orange juice manufacturing concentrate is substantially transformed if it is completely reconstituted or is blended with orange oils, essences or fresh juice.

On several occasions Customs has been called upon to determine whether orange juice at one stage of production is substantially transformed, *i.e.,* undergoes a change in name, character, or use, in the manufacturing process leading to another stage of production. These cases have arisen in the drawback context as well as in the country-of-origin context. The drawback rulings are instructive because the definitions of "substantially transformed" in the country-of-origin context and "manufacture" in the drawback context are similar.[22]

In these rulings Customs had adopted a position that for imported orange juice manufacturing concentrate to be considered "manufactured" or "substantially transformed," a substance other than water or other manufacturing concentrate must be added. This position can be seen by contrasting a ruling in which Customs held that blending imported manufacturing concentrate with domestic manufacturing concentrate does not constitute manufacturing for drawback purposes with a ruling that blending imported manufacturing concentrate with orange peel oil does. C.S.D. 81–81, 15 Cust. Bull. 900, 901 (Sept. 4, 1979) (Ruling 210693) ("[T]he mere blending or commingling of one concentrate with another concentrate of the same kind and quality does not constitute a manufacturing process for drawback."); C.S.D. 83–90, 17 Cust. Bull. 921, 922 (March 29, 1983) (Ruling 215734) ("The blending of cold-pressed orange peel oil with a batch of concentrated orange juice for manufacturing to mask the 'cardboard off flavor' of the concentrate is a manufacture or production for drawback."). The critical factor in distinguishing these rulings is the introduction of the orange peel oil, a different substantive ingredient, into the concentrate. The significance of this distinction is demonstrated in dicta in the former ruling. After finding that the mere blending of concentrate does not consititute manufacturing, Customs offered two alternatives that would, in fact, satisfy the manufacturing requirement. First, Customs suggested that "[t]he addition by a blending process of essential oils and flavoring components to a concentrate that lacks them would be considered a manufacture or production for drawback." C.S.D.

[22] See note 14, *supra*, for a comparison of the country-of-origin "substantial transformation" test with the drawback "manufacturing" test and a comparison of the different policies underlying the statutes.

81-81, 15 Cust. Bull. at 901. Second, Customs noted that "[t]he use of fresh juice to cut back the degree brix of concentrated orange juice for manufacturing is another manufacturing process for drawback." *Id.*

Furthermore, in a country-of-origin ruling, Customs found that concentrate at 58° or 65° brix that is subsequently diluted with water to 42.5° brix, but not completely reconstituted is not substantially transformed. C.S.D. 80-230, 14 Cust. Bull. 1138, 1138 (Feb. 21, 1980) (Ruling 712184). In a similar ruling, Customs found that reducing the degree brix of a concentrate by the addition of water is not a manufacturing for drawback. C.S.D. 80-162, 14 Cust. Bull. 1002, 1003 (Nov. 27, 1979) (Ruling 211084). In the latter ruling Customs again offered alternatives that would reduce the degree brix and would change the character and use of the manufacturing concentrate. These suggestions were the use of the following:

1. Fresh orange juice;
2. Pasteurized orange juice;
3. Essential oils and flavoring components;
4. Essential oils, flavoring components and water;
5. Essential oils, flavoring components and other orange concentrate; and
6. A combination of any of the above.

Id. at 1004.

The most significant ruling involves the processing of frozen concentrate that is reconstituted in Canada. C.S.D. 80-88, 14 Cust. Bull. 865 (Aug. 17, 1979) (Ruling 710823). Although the ruling does not specify the degree brix of the concentrate that is reconstituted, the opinion clearly applies to manufacturing concentrate that is made into reconstituted orange juice.[23] In other words, the process that is the subject of C.S.D. 80-88 is apparently the same process that is occurring in this case—manufacturing concentrate becomes reconstituted orange juice with the addition of water and presumably orange essences or oils. In C.S.D. 80-88, however, Customs found that this process substantially transformed the manufacturing concentrate into reconstituted juice. C.S.D. 80-88, 14 Cust. Bull. at 866.[24] In C.S.D. 85-47, at issue here, Customs decided that this process failed to substantially transform the product. The latter ruling directly contradicts the former, and Customs noted this in C.S.D. 85-47 when it stated at the end of the ruling: "Customs Ruling No. 710823 [C.S.D. 80-88], dated August 17, 1979, which holds that reconstitution of orange juice is a substantial transformation of the frozen concentrate, is overruled." C.S.D. 85-47, 19 Cust. Bull. No. 39 at 28.[25]

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[23] One of the end products at issue is reconstituted orange juice from concentrate.

[24] If there is a difference between the processes at issue, the Canadian ruling, C.S.D. 80-88, is a worse case for substantial transformation than the one at hand, because oils and essences are undisputedly added here.

[25] The court cannot agree with defendent's position that the fact that the processing involved in C.S.D. 80-88 is that of Brazilian and American manufacturing concentrate in Canada and the processing involved in C.S.D.

Continued

C.S.D. 85–47 constitutes a change in Customs' former position that the complete reconstitution of orange juice or the addition of orange oils, essences, or juice effects a substantial transformation of manufacturing concentrate. To this extent it satisfies the first requirement of section 177.10(c)(2), that is, a ruling that will effect a change in a position of Customs.

The second requirement for section 177.10(c)(2) notice is that the ending must *result* in a restriction or prohibition. Defendant argues that the ruling does not result in a "restriction" or "prohibition" within the meaning of the regulation. In support of this position, it notes that section 1581(h) lists "marking" and "restricted merchandise" as separate categories over which this court has pre-importation jurisdiction. Defendant claims that because these categories are distinct in section 1581(h), the term "restriction or prohibition" in section 177.10(c)(2) cannot be construed to include a change in country-of-origin status. The separate listing in section 1581(h) of marking and restricted merchandise, however, is not determinative. The listing merely provides examples of the types of cases that might appropriately be brought for pre-importation review. (For example, total prohibition is not mentioned.) The list is more exemplary than definitional and the court cannot accept its categorization as definitive with regard to the inclusion of changes in marking requirements as resulting in a restriction under section 177.10(c)(2).

Furthermore, the reference in section 177.10(c)(2) to "restrictions and prohibitions" must be looked at in the context of section 177.10. Section 177.10 deals generally with the publication of decisions. 19 C.F.R. § 177.10 (1985). The provisions are presumably intended to keep the public and interested parties abreast of critical decisions made by Customs. Within this scheme, the regulations acknowledge that a change in a Customs Service position which results in a change in the amount of duty owed or in a restriction or prohibition may have a significant impact on the importing or other business practices of an industry. In such a case, it is important to warn the industry that changes may be necessary and to give interested parties an opportunity to respond. These policy considerations are fully applicable to a change in country-of-origin marking requirements. For instance, in this case, the retail orange juice processors will be required to change their labeling or drastically reduce their importation of manufacturing concentrate to avoid disruption from the imposition of the marking requirements. The transition to either of these practices cannot be instantaneous. Therefore, the imported manufacturing concentrate ruling will result in a restriction in the sense that products will not be released by Customs when the certification requirements cannot be

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85–47 is that of imported manufacturing concentrate in America makes any material difference. The basic question addressed in both rulings is whether, for marking purposes, manufacturing concentrate which is processed into retail orange juice products is substantially transformed.

met. Clearly the rationale underlying section 177.10(c)(2) provides a basis for concluding that the importers and other interested parties should be forewarned and given an opportunity to comment before Customs publishes a change in position that results in restricted importation of this product.

C.S.D. 85–47, then, is appropriately considered to be a ruling that changes a position of Customs and results in a restriction. Customs was in fact reviewing its position as to whether orange juice manufacturing concentrate is substantially transformed when completely reconstituted or blended with oils, essences, or juices. As a result, Customs was required to publish notice of these circumstances and to allow interested parties to submit written comments "with respect to the correctness of the contemplated change." 19 C.F.R. § 177.10(c)(2) (1985).[26]

Although defendant failed to publish the required notice of its change in position, this omission will only affect the ruling if it results in prejudice to the plaintiff. *Gilmore Steel Corp.* v. *United States,* 7 CIT ——, 585 F. Supp. 670, 679 (1984); *American Motorists Insurance Co.* v. *United States,* 5 CIT 33, 43 (1983); *Timken Co.* v. *Regan,* 4 CIT 174, 180, 552 F. Supp. 47, 52 (1982); *Woodrum* v. *Donovan,* 4 CIT 46, 52, 544 F. Supp. 202, 207 (1982). In this case a harmless error determination must be made as to each of two parts of the ruling. The first part pertains to whether manufacturing concentrate undergoes a substantial transformation in being processed into frozen or reconstituted orange juice. Plaintiffs are not prejudiced by the failure to publish notice as to this issue because, as is obvious, plaintiffs fully participated in the administrative process. Furthermore, comments from the public at large cannot change the essentially legally correct result.

The second part of the ruling, however, involves the appropriate effective date of the ruling. Customs regulations relating to the type of ruling at issue here state that "[e]*xcept as otherwise provided for in the ruling itself,* all rulings published under the provision of this part shall be applied immediately." 19 C.F.R. § 177.10(e)

[26] There is a dispute between the parties as to whether plaintiffs raised at the agency level the issue of publication of a change in position in the Federal Register and the possible effect this would have on plaintiffs' ability to raise the issue before the court. Under either scenario, however, plaintiffs' ability to raise the issue before the court has not been affected. If plaintiffs did suggest to defendant that notice of a change in position must be published in the Federal Register, then plaintiffs adequately exhausted their administrative remedies on this point. If plaintiffs did not make this suggestion, they still cannot be said to have waived the objection. Publication in the Federal Register is only required if Customs has decided to change its position. Although plaintiffs participated in discussions about whether a change in position was desirable, they did not know that Customs had decided to effect such a change before the new ruling was published in the Customs Bulletin. Once the ruling was published, there was no formal administrative procedure for challenging the failure to publish notice in the Federal Register. Prior to that time plaintiffs could not be certain that a ruling effecting a change in position would be published. *Cf. Lois Jeans & Jackets, U.S.A., Inc.* v. *United States,* 5 CIT 238, 243–44, 566 F. Supp. 1523, 1527–28 (1983) (plaintiff who received no notice (actual or constructive) of a change in ruling likely to succeed in raising § 177.10(c)(2) objection even though it learned of change before it was implemented). The fact that this notice provision involves a change in position affecting a wide variety of interests distinguishes this situation from the cases dealing with the effects of notice of an antidumping or countervailing duty investigation. *See, e.g., United States* v. *Elof Hannson, Inc.,* 296 F.2d 779, 48 CCPA 91 (1960), *cert. denied,* 368 U.S. 899 (1961) (antidumping); *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 82 Cust. Ct. 77, C.D. 4792 (1979) (antidumping) *Energetic Worsted Corp.* v. *United States,* 51 Cust. Ct. 55, C.D. 2413 (1963), *rev'd on different grounds,* 53 CCPA 36, C.A.D. 874 (1966) (countervailing duties).

(1985) (emphasis added). This caveat leaves to Customs' discretion the option to delay the effective date of a ruling.

In its initial ruling Customs chose an effective date of January 1, 1986, a four month lag time. C.S.D. 85–47, 19 Cust. Bull. No. 39 at 28. Customs offered no reasons for choosing this date. When Customs reconsidered and changed the effective date to March 1, 1986, it also failed to articulate the reasons underlying the change. 19 Cust. Bull. No. 50 at 15 (Dec. 11, 1985). Customs correctly recognized that this is a situation in which a lag time in the effective date is appropriate. Given the size of the industry and the limited services available to assist the industry in complying with the marking requirements, it would have been an abuse of discretion not to have delayed the effective date. From the record it is clear that Customs did not seek comments from all interested parties before reaching its decision. The problem with the original effective date chosen by Customs, as well as the subsequent amended effective date, is that there is nothing in the record or in the official statements by Customs that articulate what factors were considered in choosing the dates. " '[T]he failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible.' " *Public Media Center* v. *FCC*, 587 F.2d 1322, 1331–32 (D.C. Cir. 1978) (quoting *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 945, *cert. denied*, 419 U.S. 882 (1974)).

Defendant argues that it would be contrary to the statute to delay the effective date of the ruling and that Customs has nonreviewable discretion in this area. First, this is clearly an area in which there are no policy reasons for ignoring the usual rule that presumes judicial review of agency decisions. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140–41 (1967). Second, the marking statute is not written in absolute terms. There are statutory exceptions for commercial impracticability. *See*, 19 U.S.C. § 1304(a)(3) (1982). This case does not fall within any of the listed exceptions, but Customs has properly interpreted Congressional intent in promulgating 19 C.F.R. § 177.10(e), which allows a delay in the effective date of rulings, including rulings in this area. Surely Congress did not intend grievous commercial injury to occur as a result of too precipitous implementation of changes in rulings under the marking law.

The court concludes that Customs must reconsider the effective date for C.S.D. 85–47 and must articulate reasons for its choice. In so doing, Customs must adhere to the notice and comment provisions of section 177.10(c)(2) and carefully consider all possible issues relating to a reasonable time to implement its new ruling concerning country-of-origin marking requirements.

This case is remanded to Customs for further action in accordance with this decision.

ERRATA

(Slip Op. 86–5)

NEC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

The above-noted slip opinion was originally published in CUSTOMS BULLETIN, Vol. 20, No. 6, dated February 12, 1986, starting on page 33. Delete the last paragraph on page 33 and the first two paragraphs on page 34. Replace with the following:

"The court initially notes that on December 4, 1985, prior to the filing of this motion, plaintiff filed a notice of appeal to the Federal Circuit of the November 19, 1985 judgment. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as amended in 1979, the timely filing of a motion for new trail or to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure nullifies a previously filed notice of appeal, and the time for appeal runs from the district court's disposition of the motion. *See* Advisory Committee Note to 1979 Amendment to Fed. R. App. P. 4(a)(4); *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 59–61 (1982). Since Rule 59 of this court is patterned after Rule 59 of the Federal Rules of Civil Procedure, the court concludes that it has jurisdiction to dispose of the instant motion, the filing of which nullified the previously filed notice of appeal."

ABSTRACTED CLASSIFICA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and Rate	
C86/2	Re, C.J. January 29, 1986	Bar-Zel Expediters	84-1-00129	Items 716.10-716.29 Various rates for module portion Items 720.20, 720.24, or 720.28 Various rates for case portion Item 740.35 Various rates for watch band portion	
C86/3	Re, C.J. January 29, 1986	De Laval Separator Co.	80-10-01696	Item 661.35 4.8%	

FICATION DECISIONS

D	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Rate	Item No. and Rate		
	Item 688.36 4.9%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	New York Electronic watches; an entirety
	Item 870.40 Free of duty	Customs Service Ruling, 9-27-83 (No. CLA-2 CO:R:CV:G 070609 JLV)	Detroit Bulk milk coolers or farm tanks

C86/4	Re, C.J. January 29, 1986	Gator of Florida	80-1-00058, etc.	Items 380.00, 380.04, 380.81, 380.84, 382.00, 382.33 with an allowance under item 807.00, to the cost or value of some of the fabric components which were the product of the U.S. and which were utilized in assembling the imported merchandise. No allowance under item 807.00 was made for fabric components, the product of the U.S., which were subjected to buttonhole and/or pocket slit operations during assembly of the imported garments	But p c s a a 8
C86/5	Re, C.J. January 29, 1986	Intergram	84-7-00950	Item 674.32 5.3%	Iten F
C86/6	Re, C.J. January 29, 1986	Sanwa Foods Inc.	84-7-00951, etc.	Item 774.55 6.9%, 7.3% or 7.7%	Iten 5.

	Buttonhole and pocket slit components are subject to duty allowance afforded by item 807.00	United States v. Mast Industries, Inc., 668 F.2d 501 (1981)	Miami Fabric components of U.S. origin that were subjected to buttonhole and/or pocket slit operations during foreign assembly of the imported garments
	Item A674.32 Free of duty under GSP	Agreed statement of facts	Los Angeles Drill presses with motors
	Item 772.20 5.3%, 5.8% or 6.4%	Agreed statement of facts	Los Angeles Unassembled or unfinished plastic containers chiefly used for marketing merchandise

ABSTRACTED VALUATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/1	Re, C.J. January 29, 1986	The De Laval Separator Co.	79-9-01463	Export value	Repu ur sh vo
V86/2	Re, C.J. January 29, 1986	The De Laval Separator Co.	79-11-01741	Export value	Repu ur sh vo
V86/3	Re, C.J. January 29, 1986	The De Laval Separator Co.	80-5-00825	Export value	Repu ur sh vo
V86/4	Re, C.J. January 29, 1986	The De Laval Separator Co.	80-9-01534	Export value	Repu ur sh vo
V86/5	Re, C.J. January 29, 1986	Puma USA, Inc.	83-12-01747	Transaction value	Repu pr Co Or Ko
V86/6	Re, C.J. January 29, 1986	Starlight Trading, Inc.	83-11-01588	Export value	App en tic cu

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Miscellaneous merchandise
	Represented by invoiced price paid to Y. Chen & Co. of Taiwan and Ormaco Ltd. of Hong Kong	Agreed statement of facts	Cleveland Styles 90109 and 90200W, athletic shoes
	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., C.D. 4739	New York Miscellaneous merchandise

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